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**IN MEMORY OF**

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FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**



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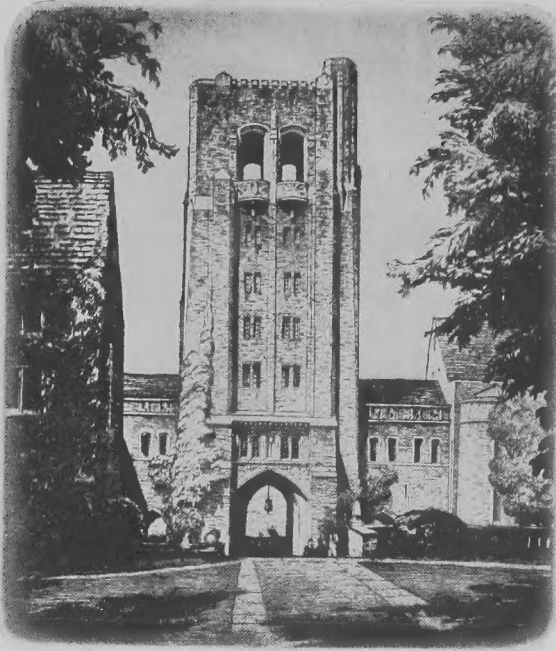
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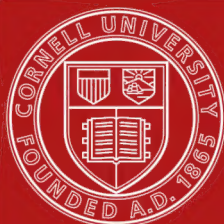


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AMERICAN  
LEADING CASES.

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VOLUME THE SECOND.

BY J. I. CLARK HARE.





A M E R I C A N  
LEADING CASES:

B E I N G

**Select Decisions**

O F

A M E R I C A N C O U R T S,

I N

S E V E R A L D E P A R T M E N T S O F L A W ;

WITH ESPECIAL REFERENCE TO MERCANTILE LAW.

WITH NOTES.

B Y

J. I. CLARK HARE AND H. B. WALLACE.

FIFTH EDITION, ENLARGED AND IMPROVED.

WITH ADDITIONAL NOTES AND REFERENCES TO AMERICAN DECISIONS  
BY J. I. CLARK HARE AND J. W. WALLACE.

VOL. II.

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# AMERICAN LEADING CASES.

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NOTICE.—GUARANTY.

JAMES W. LENT AND ANOTHER v. MANLEY PADELFOED.

In the Supreme Judicial Court of Massachusetts.

SEPTEMBER TERM, 1813.

[REPORTED, 10 MASSACHUSETTS, 230-239.]

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*Notice of matter equally within the knowledge of the plaintiff and the defendant, need not be given by the plaintiff, even when the undertaking of the defendant is for the performance of an act by a third person.*

*When the promise of the defendant is alleged to be in consideration of a future performance on the part of the plaintiff, it is unnecessary to allege a reciprocal promise by the latter, or any other assent to the contract on his part than is implied in the fact of performance.*

*A declaration upon a written contract, need not pursue or set forth the words of the contract. It is enough to set forth their legal effect and meaning.*

THE declaration in this case was in substance, that the plaintiff had issued an execution against one Joseph Barney, which was then in the hands of one T. Hinsdale, a deputy sheriff, and that the defendant undertook and promised the plaintiffs, in consideration that they would delay the service of said execution until the first Monday of June then next, and, in consideration of value received by the defendant of said Barney, that the said

Barney should make his appearance and be ready at Pittsfield, at the tavern of J. M., either to pay said execution (meaning any execution that might issue upon the same judgment), or to surrender himself to any officer who might have such execution on said day; and that if Barney was not ready, &c., as aforesaid, the defendant would pay to the plaintiffs the amount due upon such execution, with the interest thereon from the day of making the promise; and the defendant reserved to himself the right to go after the said Barney, if he should go out of the state, and deliver him at the place above mentioned on the fourth Monday of June aforesaid, thereby intending to exonerate himself from his said obligation. And the plaintiffs averred that, confiding in the defendant's said promise and undertaking, the service of said execution was delayed, &c., and no service was ever made upon it; that said Barney did not make his appearance, &c., although the said Hinsdale was then and there ready to receive payment, or to take the body of the said Barney; that the defendant did not deliver him, at, &c., on the said fourth Monday of June, although the said Hinsdale was then and there ready to take his body, &c.; and that the defendant had never in any manner discharged said execution, or paid the said interest;—whereby an action had accrued to the plaintiffs to recover of him the amount due upon said execution, with the said interest. Yet though often requested, &c.

At the trial of the case before PARKER, J., the following contract in writing, signed by the defendant, was given in evidence:

“Whereas there is now an execution in the hands of Theodore Hinsdale, Jun., deputy sheriff, in favor of James W. Lent and William H. Folger, against Joseph Barney, for the sum of seven hundred and ninety-five dollars seventy-four cents, and it cannot now be paid by said Barney; therefore, if said execution can be delayed till the first Monday of June next, and in consideration of value received of said Barney, I hereby agree and promise that said Barney shall make his appearance and be ready at Pittsfield, in the county of Berkshire, at the house of Joseph Merriek, either to pay said execution, or to surrender himself to any officer who may have the same at that time; or I will pay the same, with the interest from this time, to said Lent and Folger. Savoy, February 23d, 1809. And further, I reserve to myself the right to go after said Barney, if he goes out of the

state, and deliver him at the place above mentioned on the fourth Monday of June aforesaid.

MANLEY PADELFORD."

After a verdict for the plaintiff, a motion was made in arrest of judgment, on the ground the declaration was insufficient in not showing any promise or agreement by the plaintiff, as a consideration for the promise of the defendant, and in not containing an averment of notice to the defendant of the failure of Barney to appear at the time stipulated for in the agreement, or of any request to pay the money demanded, before the suit was brought. The opinion of the court in relation to these points was as follows:

JACKSON, J. The court have heard both these motions together, for the convenience of the parties, and to prevent delay.

The first point to be considered, in the motion for a new trial, is the supposed variance between the declaration and the writing produced in evidence. It is never necessary to declare in the precise words of a written promise. It is always allowable, and often necessary, to declare according to their legal effect and import. In the present case, we have no doubt that the promises contained in the writing were made to the plaintiffs. They are the only persons interested in the subject of the promises, which do not purport to be made to any other person; and the defendant expressly promises, in the event which has happened, to pay the money to the plaintiffs. It is like the case of a common promissory note. The words of the note are, "For value received I promise to pay to A. B.;" but in the declaration upon such a note it is always alleged that the defendant promised A. B. to pay him.

As to the other supposed variance, we are equally satisfied that the declaration comports with the legal effect of the writing. The expression, "if the execution can be delayed," as introduced in this paper, is equivalent to saying, "if you will delay it," or, "in consideration that you will delay it."

The next ground of the motion for a new trial is the supposed misdirection of the judge in instructing the jury that the contract was sufficient in law to support the action. We are all satisfied that the direction was right. We have already said that the contract was made with the plaintiffs; and, indeed, it further

appears, from the report, that it was made by the express authority of their agent. Even if the agent had no previous authority to make this contract for the plaintiffs, yet, if the agent proceeds immediately to execute the contract, in any part beneficial to the defendant, or prejudicial to the plaintiffs, and if the plaintiffs afterwards assent to it, and go on further in performance of the contract, it shall bind both parties.

As to the consideration, there is no necessity of deciding, on this occasion, whether it must always be expressed in the writing, according to the opinion in the case of Wain & Walters, because this power does sufficiently express the consideration. It does not appear whether it was of any benefit to the defendant; but it was a prejudice to the plaintiffs, viz., suspending the service of the execution from February to June. It cannot be supposed that, in such a case, the writing should show that the whole consideration was executed on the part of the plaintiffs. That is obviously impossible in every case where the consideration is a forbearance until a future day.

But it is said that it does not appear, in this writing, that the plaintiffs agreed to forbear their remedy until June. We know of no rule that requires the contract of the plaintiffs in this case to be contained in the same paper which contains that of the defendant, nor even that the former should be reduced to writing at all. The statute of frauds, in its most strict construction, would require only the motive, cause, or consideration of the promise to be expressed, so that the court could judge of its sufficiency; not that the same paper should also contain the evidence of the performance, delivery, or receipt of the thing upon which the promise is founded. It is enough if the court can decide, upon inspection of the paper, that the consideration is sufficient in law: it is a question for the jury, whether that consideration has been in fact performed or received. It appears in this case that the plaintiffs, by their agent, did authorize and assent to this contract, and that they have performed it on their part. As this agreement of the plaintiff is not required to be made in writing, it may of course be proved by parol testimony.

As to the amount of damages, we are satisfied that the jury were rightly instructed by the judge. This is not merely an agreement by the defendant to do a collateral thing; nor is the money to be paid by way of penalty for a breach of the contract. We do not consider the damages thus liquidated by the parties,

to be unreasonable in the event which was contemplated, and which has since occurred. The defendant has agreed, in a certain event, to pay this sum; and we have no power, in this case, to alter his agreement.

There are two grounds of the motion in arrest of judgment. The first is, that no sufficient consideration for the defendant's promise is set forth in the declaration. The declaration states that, in consideration that the plaintiffs would delay the service of their execution, the defendant promised; and then it is averred that the plaintiffs did delay the service accordingly. This appears to us sufficient. It is the usual mode of declaring in such case in the books of entries.

This manner of stating the consideration and the contract is not confined to cases of forbearance. It is not uncommon, in the case of goods sold, to declare that, in consideration that the plaintiff would sell and deliver to the defendant such goods, the latter promised to pay a certain price, and then to aver that he did sell and deliver them accordingly. So, in consideration that the plaintiff would do any other specific thing, and then aver the performance, without alleging that the plaintiff had promised to do it. This is not one of the cases in which it is necessary to state in the declaration mutual promises, as the consideration of each other.

The other ground of the motion in arrest of judgment at first excited the most doubt in the minds of the court. It is the want of averring notice to the defendant that the said Barney did not appear at the time and place prescribed, and a special request to the defendant to pay the money.

But upon further consideration, we are satisfied that the declaration is in this respect sufficient. The general rule is perfectly well settled. When the matter alleged lies peculiarly in the knowledge of the plaintiff, he must aver that the defendant had notice; but when it lies equally in the knowledge of the defendant, such averment is unnecessary. The case at bar comes within the latter branch of the rule. There was no act to be done exclusively by the plaintiffs. It may even be said that the matter, by which the defendant was to be discharged, was an act to be performed by himself. He promises that Barney shall make his appearance; he undertakes to have him at a day and place certain, and he must know whether he has done so.

But without going to this length, it is sufficient if the act were

to be done by a stranger. The defendant had as good means of information as the plaintiffs, and he was bound to take notice whether Barney made his appearance at the time and place appointed. It was not necessary, then, for the plaintiffs to give him formal notice of the fact; and of course it is not necessary to aver such notice in the declaration.

As to the want of averring a special request, we should yield with difficulty to such an objection, after a verdict on the merits of the case. The only use of a special request is to avoid vexatious suits, by giving to the defendant an opportunity of paying an undisputed demand. It is apparent in the case before us, that it would have been a fruitless ceremony. We are not, however, satisfied that such a request was required by the strictest rules of law. The defendant may be considered as agreeing to do, or cause to be done, one of two things. When he knew that the one was not performed, he became immediately liable to perform the other. The payment of the money became a present duty, as if there had been no alternative in the original contract. In such a case, the general averment of *licet scipius requisitus* is sufficient.

Judgment on the verdict.

JAMES S. DOUGLASS AND OTHERS, PLAINTIFFS IN ERROR, *v.*  
REYNOLDS, BYRNE & COMPANY, DEFENDANTS IN ERROR.

In the Supreme Court of the United States.

JANUARY TERM, 1833.

[REPORTED, 7 PETERS, 113-129.]

*A letter was addressed by the defendants to the plaintiffs, in the following words. "Gentlemen:—Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or endorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the*

*said Chester Haring fail to do so.” Held, to be a continuing guaranty, and that the plaintiffs might give parol evidence to prove that subsequent advances to Haring were made on the faith of the letter.*

*In the case of such a guaranty, the guarantor is entitled to notice within a reasonable time that it has been accepted, and also of the ultimate amount of the advance made under it, but not of each particular advance, while the transactions under the guaranty are still continuing and open.*

*A demand must be made on the principal, and notice of his default given to the guarantor within a reasonable time, in order to charge the latter.*

THE opinion of the court was delivered by STORY, J.\*

This case comes before us upon a writ of error to a judgment of the District Court for the district of Mississippi, in which the plaintiffs in error are defendants in the court below.

The original action is founded upon a guarantee, given by Douglass and others in favor of one Chester Haring, by the following letter:

*“Port Gibson, December, 1807.*

“MESSRS. REYNOLDS, BYRNE & Co.

“Gentlemen:—Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or endorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

Your obedient servants,

“JAMES S. DOUGLASS,

“THOMAS G. SINGLETON,

“THOMAS GOING.”

The declaration contains two counts. The first alleges that, upon the faith of the letter, the original plaintiffs accepted and endorsed drafts or paper of Haring to the amount of eight thousand dollars, which they were obliged to pay, and did pay at the maturity thereof; and of which they gave due notice to the defendants. The second count is for money lent, and money had

\* The facts of this case appear sufficiently from the opinion of the court.

and received. But this may be laid entirely out of the case, since it is very clear, that, upon a collateral undertaking of this sort, no such suit is maintainable.

At the trial upon the general issue and the plea of payment, the plaintiffs, who are resident merchants at New Orleans, offered evidence to prove the payment of five promissory notes, dated on the 1st of May, 1829, payable to Daniel Greenleaf or order, and endorsed by him, viz.: one note due on the 20th of November, 1829, for four thousand dollars; one due on the 20th of December, 1829, for four thousand five hundred dollars; one due on the 20th of January, 1830, for five thousand five hundred dollars; and one due on the 20th of February, 1830, for five thousand five hundred dollars; and one due on the 20th of March, 1830, for five thousand five hundred dollars, in the whole amounting to twenty-five thousand dollars; and that the notes had been discounted with the plaintiff's endorsement thereon, and were taken up by them at maturity.

It also appeared in evidence, that soon after the letter of guarantee had been received, acceptance had been made of the drafts of Haring by the plaintiffs to the amount of eight thousand dollars; and that other large transactions of debt and credit took place between them, upon which, on the 1st of May, 1829, there was a balance of principal of twenty-two thousand five hundred and seventy-three dollars and twenty-three cents, besides interest due to the plaintiffs, and credits to a larger amount than eight thousand dollars had come into the possession of the plaintiffs. And on that day the foregoing notes were received, and the following receipt written on the account containing the balance.

“Received, Port Gibson, May 1st, 1829, in part and on account of the above account, and interest that may be due thereon, the following notes, to wit [enumerating them], amounting in all to twenty-five thousand dollars, which notes, when discounted, the proceeds to go to the credit of this account.

“REYNOLDS, BYRNE & Co.”

There was a good deal of other evidence in the cause, but it does not seem necessary to state it at large, since no part of it becomes important to a just understanding of the merits of the controversy, as it now stands before us.

In the progress of the trial the depositions of several witnesses, who were clerks in the counting-house of the plaintiffs, were read,



in which they stated, that they knew that the letter of credit was considered by the plaintiffs as covering any balance due by Chester Haring to the plaintiffs for advances from that time to the extent of eight thousand dollars; and that advances were made, and moneys paid by them on account of Haring from the time of receiving the said letter of credit, predicated on the said letter always protecting the plaintiffs to the amount of eight thousand dollars, whenever the said amount or less might be uncovered; and that it was considered in the said counting-house of the plaintiffs, as a continuing letter of credit, and so acted upon by the plaintiffs. To the admission of this part of the depositions the defendants objected; but the court overruled the objection, and permitted the evidence to be read to the jury as evidence of *the reliance of the plaintiffs upon the letter of credit to the amount of the eight thousand dollars*, for acceptances, payments, advancements, and endorsements made to Haring. The defendants excepted to this admission of the evidence; and the propriety of this ruling of the court constitutes the first question in the case.

We are of opinion that the evidence was rightly admitted in the view and for the purposes stated by the court below. It was not offered to explain or establish the construction of the letter of credit (see *Russell v. Clarke*, 3 Dall. 415, S. C. 7 Cranch's Rep. 69), whether it constituted a limited or continuing guarantee; and was not thus open to the objection, which has been relied on at the bar, that it was an attempt by parol evidence to explain a written contract. It was admitted simply to establish, that credit had been given to Haring upon the faith of it from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be open to the suggestion, that no such advances, acceptances or endorsements had in fact been made upon the credit of it; an objection which, if founded in fact, might have been fatal to their claim. Nothing can be clearer upon principle, than that if a letter of credit is given, but in fact no advances are made upon the faith of it, the party is not entitled to recover for any debts due to him from the debtor, in whose favor it was given, which have been incurred subsequently to the guarantee, and without any reference to it.

The other exceptions are to certain instructions prayed by the defendants, and refused by the court.

They are as follows :

1. That the said letter of credit sued on is not a continuing guarantee, but is a limited one; and that when an advance or advances, acceptance or acceptances, endorsement or endorsements, had been made by the plaintiffs on the faith of said letter of credit to the amount of eight thousand dollars, the guarantee became *functus officio*, and ceased to operate upon any future advances, acceptances, or endorsements, made by said plaintiffs for Chester Haring. And that if the said plaintiffs received from said Haring, in payment of their advances, acceptances, or endorsements, made on account of said guarantee, the amount of eight thousand dollars, it was a discharge of said letter of guarantee; and that any future advances, acceptances, or endorsements, cannot be charged against and recovered from the defendants, by virtue of said letter of credit.

2. That to entitle the plaintiffs to recover on said letters of guarantee, they must prove that notice had been given, in a reasonable time after said letter of guarantee had been accepted by them, to the defendants that the same had been accepted.

3. That to entitle the plaintiffs to recover on said letter of credit, they must prove that, in a reasonable time after they had made advances, acceptances, or endorsements for said Haring on the faith of said letters of guarantee, they gave notice to said defendants of the amount and extent thereof.

4. That to entitle the plaintiffs to recover on said letters of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor of the debt sued for; and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants; and in failure of such proof, the defendants are in law discharged.

5. That the promissory notes, drawn by C. Haring, the principal debtor, and endorsed by Daniel Greenleaf, and received by the plaintiffs on the 1st of May, 1829, as expressed in said receipt of that date at the end of their said account, and the discounting the same in New Orleans by the plaintiffs after they had endorsed the same for that purpose, the same being discounted before they fell due, and the receipt of the net proceeds arising from the discounting, carried to the credit of Chester Haring's account on the books of the plaintiffs, was a discharge of the guarantors on said guarantee, provided the debt now sued for was included in the

sum total of said account, on account of which said promissory notes were taken and receipted for.

6. That if the said notes, mentioned in said receipt, were received as conditional payments of said debt, the defendants are discharged unless it be proved that due diligence has been used to recover the amount called for by said notes from the individuals responsible thereon, and that the same could not be obtained.

7. That the plaintiffs, by accepting said notes on account of said debt, from C. Haring, the principal debtor, with D. Greenleaf, as endorser on account of said debt, the same being at that time due, and receiving the money on the same by discounting them, and the passing said notes away by endorsement, could not have sued Haring for the original debt, before said notes fell due, dishonored and returned to the plaintiffs; and that, therefore, they by their own act placed it out of their power to proceed against said Haring, to recover said debt, before said notes fell due and were returned to the plaintiffs, which, in law, discharged the guarantors.

There was another exception, but it was withdrawn from the cause by the defendants; and that, as well as another respecting the refusal of the court to sign the bill of exceptions, without incorporating in it the evidence given at the trial, may be dismissed without commentary. It is proper to add, however, that the conduct of the court in relation to the bill of exceptions constitutes no just matter of error revisable in this form of proceeding; and if it did, we see no reason to question the propriety of its conduct upon the present occasion. It is manifestly proper for the court to require, that all the evidence which is explanatory of the true points of the exceptions should be brought before the appellate court, to assist it in forming a correct judgment.

The question involved in the first instruction is, whether the guarantee contained in the letter is a limited or a continuing guarantee; or, in other words, whether it covered advances, acceptances, and endorsements, in the first instance to the amount of eight thousand dollars, and terminated when these were discharged; or whether it covered successive advances, acceptances, and endorsements made to the same amount at any future time, toties quoties, whenever the antecedent transactions were discharged. Upon deliberate consideration, we are of opinion, that it is a continuing guarantee; and we found ourselves upon the language, and the apparent intent and object of the letter. Every

instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction beyond the fair import of the terms. It was observed by this court in *Russell v. Clarke's Executors*, 7 Cranch, 79, S. C. 2 Peters's Cond. Rep. 417, that "the law will subject a man, having no interest in the transaction, to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction." On the other hand, as these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose it was recognized by this court in *Drummond v. Prestman*, 12 Wheat. Rep. 515, as a rule in expounding them, that the words of the guarantee are to be taken as strongly against the guarantor as the sense will admit (*Fell on Guarantee*, ch. 5, p. 129, &c.); and the same rule was adopted in the King's Bench in *Mason v. Pritchard*, 12 East's Rep. 227.

If we examine the language or object of the present letter, we think it is difficult to escape from the conclusion, that it was intended, and was understood by all the parties as a continuing guarantee. There is no doubt, that it was so interpreted by the plaintiffs. The object is to assist Haring in business: "our friend Mr. Chester Haring," to assist him "in business may require your aid." It was not contemplated to be a single transaction, or an unbroken series of transactions for a limited period. The aid required was to be "from time to time, either by acceptance or endorsement of his paper, or advances in cash." The very nature of such negotiations, with reference to the business of the party, unless other controlling words accompanied them, would seem to indicate a succession of acts at different periods, having no definite termination, or necessary connection with each other. The language of the letter then proceeds: "in order to save you from harm in so doing, we do hereby bind ourselves, &c., to be responsible to you *at any time*, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail so to do." It is difficult to satisfy this language without giving to the guarantee a continuing operation. The parties agree to be

responsible *at any time* for a sum not exceeding eight thousand dollars; and if so, is not the natural, nay necessary import, that the acceptances, endorsements and advances are not limited in duration; but that whenever made, and at whatever future times, the same responsibility shall attach upon them, not exceeding eight thousand dollars? We think, that it would be difficult to give any other interpretation to the language, without subjecting mercantile papers to refinement and subtleties, which would betray innocent men into the most severe losses, by an unsuspecting confidence in them. That the language fairly admits of, if it does not absolutely require, this construction, cannot be doubted. If it does so, it is but common justice, that it should receive this construction, in favor of innocent parties, who have made acceptances, endorsements and advances upon the faith of it, according to the rule already stated, that the words shall be taken as strongly against the party using them as the sense will admit.

It is rare, that in cases of guarantee the language of the instruments is such as to make the decision upon one an exact authority for that of another. The whole words and clauses are to be construed together, and that sense is to be given to each, which best comports with the general scope and intent of the whole. So far as authorities go, however, we think they are decidedly in favor of the interpretation which we have adopted. In *Mason v. Pritchard*, 12 East's Rep. 227, S. C. 2 Camp. 436, the words of the guarantee were, "to be responsible for any goods he hath or may supply my brother with to the amount of one hundred pounds;" and the court were of opinion that it was a continuing or standing guarantee to the extent of one hundred pounds, which might at any time become due for goods supplied until the credit was recalled. That case was certainly founded upon words less expressive and cogent than those of the case before us. In *Merle v. Wells*, 2 Camp. Rep. 413, the guarantee was, "I consider myself bound to you for *any* debt he (my brother) may contract for his business as a jeweller, not exceeding one hundred pounds, after this date." Lord Ellenborough held it a continuing guarantee for any debt not exceeding one hundred pounds, which the brother might from time to time contract with the plaintiffs in the way of his business; and that the guarantee was not confined to one instance, but applied to debts successively renewed. The case of *Sansom v. Bell*, 2 Camp. Rep. 39, before

the same learned judge, is to the same effect. The case of *Barton v. Bennett*, 3 Camp. Rep. 220, was upon words far less stringent. There the guarantee was, "I hereby undertake and engage to be answerable to the extent of three hundred pounds for *any* tallow or soap supplied by B. to F. and B., provided they shall neglect to pay in due time." Lord Ellenborough held it a continuing guarantee, principally upon the force of the word *any*; but the case went off upon another point.

The cases cited on the other side are all distinguishable. *Kirby v. The Duke of Marlborough*, 2 Maule & Selw. 18, turned upon the ground that the whole recital of the bond showed that a limited guarantee, for advances to a definite amount, when they were made the guarantee, became *functus officio*. In *Melville v. Hayden*, 3 Barn. & Ald. 593, the guarantee was, "I engage to guaranty the payment of A. to the extent of sixty pounds at quarterly account, bill two months, for goods to be purchased for him of B.;" and the court held that it was not a continuing guarantee, as the words "quarterly account" imported only the first quarterly account; and relied on the word "any" in *Mason v. Pritchard*, as distinguishing that case from the one before them. The case of *Rogers v. Warner*, 8 Johns. Rep. 119, was on a guarantee in these words: "If A. and B., our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish;" and the court held it to be a limited guarantee for a single credit. It is observable, that here no words of continuing credit, such as "from time to time," or "at any time" are used; so that the whole language is satisfied by one transaction. It is, therefore, strongly distinguishable from that before this court.

We cannot admit, therefore, as has been contended at the bar, that the courts have inclined to vary the rule of construction of instruments of this nature, and to hold the rule of *strictissimi juris*, as to their interpretation. And we are well satisfied that the authorities in no degree interfere with the construction which we have given to the terms of the present letter. The court below were, then, right in refusing the first instruction.

The second instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove, that notice had been given to the defendants of that fact in a reasonable time after the guarantee had been accepted. Whether there was not evidence before the jury sufficient to have justified them in draw-

ing the conclusion, that there was such notice, we do not inquire. It is sufficient for us to declare, that in point of law, the instruction asked was correct and ought to have been given. A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it, or not. It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose favor it is given. Especially it is important in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it.

The third instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove that, in a reasonable time after they had made advances, acceptances or endorsements, for Haring on the faith of the guarantee, they gave notice to the defendants of the amount and extent thereof. If this had been the case of a guarantee limited to a single transaction, there is no doubt, that it would have been the duty of the plaintiffs to have given notice of the advances, acceptances, or endorsements made to Haring, within a reasonable time after they were made. But this being a continuing guarantee, in which the parties contemplated a series of transactions, and as soon as the defendant had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances, and endorsements, which would be renewed and discharged from time to time, we cannot perceive any ground of principle or policy upon which to rest the doctrine that notice of each successive transaction, as it arose, should be given. All that could be required would be, that when all the transactions between the plaintiffs and Haring under the guarantee were closed, notice of the amount for which the guarantors were held responsible should, within a reasonable time afterwards, be communicated to them. And if the instruction had asked nothing more than this, we are of opinion, upon principle, as well as upon the authority of *Russell v. Clarke's Executors*, 7 Cranch, 69, S. C. 5 Peters's Cond. Rep. 417; and *Edmonston v. Drake*, 5 Peters, 624, that it ought to have been given. See *Oxley v. Young*, 2 H. Bl. 613; *Peel v. Tatlock*, 1 Boss. & Pull. 419. But it goes much further, and requires, in the case of a continuing guarantee, that every successive transaction under it should be communicated

from time to time. No case has been cited which justified such a doctrine, and we can perceive no principle of law, which requires it. The instruction was therefore properly refused.

The fourth instruction insists, that a demand of payment should have been made of Haring, and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendant, otherwise the defendants would be discharged from their guarantee. We are of opinion, that this instruction ought to have been given. By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements are indispensable to constitute a *casus foederis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose; but have a right to insist that the risk of their responsibility shall be fixed and terminated within a reasonable time after the debt has become due. The case of *Allen v. Rightmere*, 20 Johns. Rep. 365, is distinguishable. There the note was payable to the defendant himself or order, at a future day, and he endorsed it with a special guarantee of its due payment; and the court held this engagement absolute and not conditional.

The fifth instruction insists that the promissory notes mentioned in the receipt of the 1st of May, 1829, when discounted, and the proceeds carried to the account of Haring, operated a discharge of the guarantors, provided the debt sued for was included in the sum total of the account for which those notes were received. We think, that the court were not bound under the circumstances to give this instruction. It proceeds upon the ground, that the notes were necessarily received as an absolute payment, a fact which the court had no right to assume, and that by endorsing the notes and procuring the same to be discounted and credited in the account, the guarantee was, *per se*, discharged. This is not correct in point of law; for if the plaintiffs, by their endorsements, were compellable to pay, and did afterwards pay their notes upon their dishonor by the maker, and these notes



fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors.

The sixth instruction asserts, that if the notes mentioned in the receipt were received as conditional payments of the said debt, the defendants were discharged, unless it is proved that due diligence had been used to *recover* the amount of them from the individuals responsible thereon, and that the same could not be obtained. If, by the word "recover," were here intended a recovery by a suit at law, the proposition could not be maintained. But if, as we suppose, it is used in the sense of collect or obtain, its correctness as a general proposition in cases of conditional payments of debts by notes, is admitted. He, who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged. The difficulty is in applying the doctrine to the circumstances of the present case, in the actual form in which it is propounded in the instruction. It assumes as matter of fact, what the court cannot intend, that the notes were received as conditional payment. It does not assert what the debt is to which it alludes; though it probably refers to the debt stated in the account connected with the receipt. Now, that account is not in terms sued for, but certain drafts amounting to eight thousand dollars, accepted and endorsed, and paid by the plaintiffs; and whether they were included in the account or not, was matter of evidence, and not matter of law. Although, then, the instruction asserted a proposition generally true in point of law, it is not clear, that, in the very terms in which it is propounded, with reference to the case in judgment, the court were bound to give it, since it involved matters of fact.

The seventh instruction is open to a similar objection. It manifestly assumes, as its basis, general questions of fact, upon which the court had no right to pronounce judgment. It also supposes that the debt sued for is wholly confined to the account, and that the notes referred to were not within the scope of the guarantee, and, if paid by the plaintiffs, could not be recovered by the defendants; which is far from being admitted. Indeed, this and several of the preceding instructions proceed upon the ground, that the guarantee was a limited and not a continuing guarantee, which construction has been already overturned.

Upon the whole, we are of opinion that the court below erred in refusing the second and fourth instructions prayed by the defendants, and that for these errors the judgment must be reversed, and the cause remanded to the District Court of Mississippi with directions to award a venire facias de novo.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the district of Mississippi, and was argued by counsel, on consideration whereof it is the opinion of this court, that the court below erred in refusing the second and fourth instructions prayed by the defendants, and that for these errors the judgment must be reversed. Whereupon it is adjudged and ordered by this court, that the judgment of the said District Court in the cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court, with directions to award a venire facias de novo.

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JAMES M. REYNOLDS, JOHN B. BYRNE AND WILLIAM FARRIDAY, MERCHANTS TRADING UNDER THE FIRM OF REYNOLDS, BYRNE & CO. *v.* JAMES S. DOUGLASS, THOMAS G. SINGLETON AND THOMAS GOING.\*

In the Supreme Court of the United States.

JANUARY TERM, 1888.

[REPORTED, 12 PETERS, 497-506.]

*In a suit on a guaranty, evidence of the insolvency of the principal is prima facie sufficient, to excuse an omission by the plaintiff's to make a demand upon him and give notice of his default to the guarantor. But any injury actually occasioned by the omission, may, notwithstanding, be relied on as an entire or partial defence to the action.*

*A conditional or unconditional promise of payment made by the guarantor, with a full knowledge of the facts, will amount to a*

\* The facts of this case sufficiently appear from the opinion of the court.

*waiver of his right to take advantage of a failure to give him notice. But such promise will not be a waiver if coupled with a condition which is rejected.*

Mr. Justice McLEAN delivered the opinion of the court:

This case is brought before this court by a writ of error to the District Court of Mississippi.

The action is founded on the following guaranty:

*"Port Gibson, 27th Decemler, 1827.*

Messrs. Reynolds, Byrne & Co.,

Gentlemen:—Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptances or endorsements of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

Your obedient servants,

JAMES S. DOUGLASS.

THOMAS G. SINGLETON.

THOMAS GOING."

On the trial, the plaintiffs proved that they treated this paper as a continuing guaranty; and from time to time, on the faith of it, accepted drafts, endorsed bills, and made advances of money at the request of Haring. And an account current was given in evidence showing a balance due to the plaintiffs, from Chester Haring, on the 1st July, 1828, of thirteen thousand seven hundred and two dollars and seventy-three cents; on the 1st of January, 1829, of thirty-two thousand nine hundred and twenty dollars and fifty-seven cents; and on the 1st of July, in the same year, of twenty-five thousand one hundred and nine dollars and fifty-seven cents. And eight bills of exchange, drawn by Haring, on the plaintiffs, amounting to eight thousand dollars, and which were accepted and paid by them in the year 1828, were also given in evidence.

On the 1st of May, 1828, it was proved that Haring executed five promissory notes, in the whole amounting to twenty-five thousand dollars, which were endorsed by Daniel Greenleaf, and

also by the plaintiffs; and which were payable in the months of November, December, January, February and March, succeeding; the proceeds of which notes when discounted, were to be credited to Haring in the general account.

On the 11th of April, 1829, Haring sold and transferred to Daniel Greenleaf his mercantile establishment, which constituted the whole of his property, and in August or September following, he died.

At the time this transfer was made, Greenleaf gave a bond in the penalty of thirty-two thousand dollars, with Thomas G. Singleton, one of the guarantees, and others security, conditioned that he would faithfully pay the debts of Haring, as therein stated; and especially after paying the home debts, "that he should pay the sum of eight thousand dollars to the securities and signers of a letter of credit to Reynolds, Byrne & Co., in favor of the concern of Chester Haring, for that amount; or otherwise relieve and exonerate the securities and signers to said letters of credit." And on the 24th of December following, Daniel Greenleaf assigned to James S. Douglass, another of the guarantees, by deed of trust, on the conditions stated therein, "all his debts, claims and demands, either at law or in equity, due, or to become due." This assignment included the property, &c., he received from Haring.

One of the witnesses examined, stated that he heard James S. Douglass and Thomas Going say, they considered the above assignments would indemnify them for their liability under the guaranty.

There was a good deal of evidence in the case, which, in considering the question of law on the instructions, it is not material to notice.

This case was brought before this Court on certain exceptions, at the January Term, 1833; at which time the following points were adjudged:

1. That the paper in question was a continuing guaranty, and was not discharged on the payment of advances, acceptances and endorsements amounting to eight thousand dollars; and that it covered future and successive advances, acceptances and endorsements.

2. That to entitle the plaintiffs to recover on the guaranty, they must show that within a reasonable time, they gave notice of its acceptance.

3. That notice of the future and successive advances, acceptances and endorsements, after the acceptance of the guaranty, was not necessary.

4. That in case of non-payment, the plaintiffs were required to show a demand of Haring; and, within a reasonable time, a notice to the guarantees.

After the evidence was closed, the plaintiffs moved the court to instruct the jury, "If they believe that Chester Haring was insolvent previous to the maturity of any of the five promissory notes drawn by Chester Haring, dated the 1st of May, 1829; and that these notes were endorsed upon the faith of the letter of credit by the plaintiffs; then such previous insolvency rendered it unnecessary for the plaintiffs to give the defendants, as guarantors, notice of a demand upon and refusal by Chester Haring to pay the said notes; and the plaintiffs are entitled to recover. But the court refused to charge as requested; and charged the jury that the insolvency of Chester Haring could be proved only by a record of the insolvency, or by admission of the defendants, and not by common rumor or hearsay evidence."

This instruction was incautiously drawn, and its language is open to criticism. It would seem at the first view, to place the right of the plaintiffs to recover, on the fact of Haring's insolvency. This would dispense with notice of the acceptance of the guaranty, and with all evidence of advances of money by the plaintiffs, and of acceptances and endorsements under it, except the five notes referred to. But such could not have been the meaning of the instruction, as understood by the counsel concerned in the case, and by the court. Much evidence had been given of advances of money, of acceptances and of endorsements on the faith of the guaranty; and also evidence of facts, from which the jury might, in the exercise of their discretion, infer a notice to the defendants that the guaranty had been accepted. In the view of these facts, it cannot be supposed that the plaintiffs would ask the court to instruct the jury to find in their favor; aside from all the other evidence in the case; if the insolvency of Haring should be satisfactorily established.

The instruction was undoubtedly intended to cover the objection that no demand had been made of Haring on his failure to pay, nor notice given to the defendants. And that if the jury should find the notes referred to had been endorsed on the faith of the letter of credit, the previous insolvency of Haring rendered

notice of a demand on him unnecessary; and consequently the want of this notice constituted no objection to the plaintiffs' recovery. That the court considered the instructions in this light, is clear from the qualification which they annexed to it. By charging the jury that the insolvency of Haring could be proved only by the admission of the defendants, or by record evidence, the court seem to consider if the fact of insolvency were legally made out, demand and notice were unnecessary.

Although the objection to the structure of the prayer is not without force, yet we are inclined to think that if the instruction had been given in the terms requested by the plaintiffs, under the circumstances, it could not have misled the jury. They could not have understood the instruction as laying down the basis of a recovery, independent of all other evidence in the case.

In this part of the record, the question is fairly raised whether the insolvency of Haring, either prior to or at the time of payment, will excuse the plaintiffs from making a demand on him, and giving notice to the guarantees.

At the death of Haring, the notes given by him, on the 1st May, 1829, and endorsed by Greenleaf, were not due. And these promissory notes, to have had an influence in the case, under the instruction, must have been endorsed by the plaintiffs on the faith of the guaranty.

An objection is made, that these notes greatly exceed in amount the guaranty; and, consequently, that they could not have been endorsed on the credit of the guarantees. The same objection is urged against the various balances, which exceed the amount of the guaranty as stated in the account current. And it is contended, that to bind the guarantees, the advances, acceptances and endorsements, although made at successive periods, on the faith of the guaranty, must not exceed it in amount.

If this objection were well founded, it could not affect the right of the plaintiffs. They have brought their action on the guaranty, and exhibit eight bills of exchange, amounting to eight thousand dollars, which they aver were accepted and paid by them on the faith of the guaranty.

The question as to the liability of the guarantees, under acceptances and endorsements, for a sum exceeding eight thousand dollars, does not, therefore, arise in this case; and it is unnecessary to consider it. The advances which were made from time to time, and also the acceptances and endorsements on the credit of

the guaranty, go to show how it was considered and treated by the plaintiffs. And it was a question for the jury to determine, whether the advances, acceptances and endorsements, as alleged by the plaintiffs, were made under the guaranty.

If the insolvency of Haring was a material fact in the case, how was it to be proved? Could it be proved only by record evidence, or by the admissions of the defendants, as decided by the District Court? No reason is perceived for this rule, and there is no principle of law that sustains it. The insolvency of Haring should be proved in the same manner as any other fact in the cause. Was he without property, and unable to pay the demands against him? There can be no difficulty in showing his circumstances, by competent proof.

But does the insolvency of Haring, if it be established, excuse the failure to make a demand on him at the maturity of his notes; and to give notice to the guarantees?

In the case of *Gibbs v. Cannon*, 9 Sergt. & Rawle, 198, it was held, that on a guaranty of a promissory note, drawn and endorsed by others, if the drawer and endorser are insolvent when the note becomes due, this would, prima facie, be evidence that the guarantor was not prejudiced; and therefore the giving him notice of non-payment, is in such case dispensed with. And in the case of *Halbrow v. Wilkins*, 1 Barn. & Cressw. 10, the court say, if a guarantor of a bill be informed, before it is due, of the insolvency of the acceptors, and that the plaintiff looked to him for payment, it is not necessary to prove presentment and notice of non-payment.

In the case of *Warrington and another v. Fubor and Warrington*, 8 East, 242, Lord Ellenborough says: the same strictness of proof is not necessary to charge the guarantees, as would have been necessary to support an action upon the bill itself, where, by the law merchant, a demand upon and refusal by the acceptors must have been proved in order to charge any other party upon the bill; and this, notwithstanding the bankruptcy of the acceptors. But this is not necessary to charge guarantees, who insure, as it were, the solvency of the principals; and, therefore, if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead; and it is nugatory to go through the ceremony of making a demand upon them.

Mr. Justice Lawrence, in the same case says, that, although proof of a demand on the acceptors, who had become bankrupts, was not necessary to charge the guarantees; yet that the latter

were not prevented from showing that they ought not to have been called upon at all; for that the principal debtors could have paid the bill if demanded of them. And Mr. Justice Le Blanc also says, in the same case, there is no need of the same proof to charge a guarantee, as to charge a party whose name is upon the bill of exchange; for it is sufficient, as against the former, to show that the holder of the bill could not have obtained the money by making a demand upon the bill.

In the third volume of his Commentaries, 123, Chancellor Kent says, it has been held that the guarantor of a note could be discharged by the laches of the holder, as by neglect to make demand of payment of the maker, and give notice of non-payment to the guarantor; provided the maker was solvent when the note fell due, and became insolvent afterwards. The rule is not so strict as in the case of mere negotiable paper; and the neglect to give notice must have produced some loss or prejudice to the guarantor.

The same principle is laid down in the following cases: *Philips v. Astling*, 2 Taunt. 206; *Swinyard v. Bowes*, 5 M. & S. 62; *Van Wert v. Woolley*, 3 Barn. & Cressw. 439.

The rule is well settled, that the guarantee of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity. That his liability continues, unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note, and non-payment.

In the case before us, there is no pretence that the defendants have sustained any injury from a neglect of the plaintiffs to make a demand on Chester Haring for payment of the balances against him, in the account current; or for the amount paid in discharge of the eight bills of exchange referred to in the declaration.

But if the defendants could prove they had suffered damage by the neglect of the plaintiffs to make the demand and give notice, according to the case of *Van Wert v. Woolley*, 3 Barn. & Cressw. 439; they could only be discharged to the extent of the damage sustained.

As before remarked, Haring died before any of the promissory notes dated 1st May, 1829, became due; and consequently, no demand on him for the payment of these notes could be made. From the facts in the case, it appears that the defendants resided in Port Gibson, the place where Haring lived; and it cannot be doubted that they had knowledge of his death.



From these considerations, it is clear that the District Court erred in refusing to give the first instruction asked by the plaintiffs.

The plaintiffs also requested the court to charge that if the jury believed that Chester Haring transferred all his property to Daniel Greenleaf, on the 11th April, 1829, and that Daniel Greenleaf at that time was engaged to pay all the debts of the said firm, and to secure the defendants from their liability on the letter of guaranty; and that Daniel Greenleaf, on the 24th December, 1829, by deed of trust to one of the defendants, James S. Douglass transferred claims to the amount of twenty-eight or nine thousand dollars, to secure the defendants for their liability on said letter of credit; then it is not necessary for the plaintiffs to prove that the defendants were duly notified of their liability on said letter of credit; which charge the court refused to give.

The facts, hypothetically stated as the basis of this instruction, are such as if found by the jury, must have had influence on their minds; for they conduce to show that the defendants had received knowledge of their responsibility under the letter of credit, and of the circumstances of Haring. But as the instruction does not necessarily import the insolvency of Haring, which, or his death, can alone excuse the plaintiffs from making a demand on him, and giving notice to the defendants of his failure to pay; the court did not err in declining to give the instruction. The facts supposed in the instruction might be admitted; and yet the insolvency of Haring, at some subsequent period, would not follow as a consequence.

Several instructions were given by the court, at the request of the defendants' counsel, to which the plaintiffs excepted; and we will now consider them.

And first, the court charged the jury, that to entitle the plaintiffs to recover on said letters of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted. This instruction being in conformity to the rule formerly laid down by this court in this case, was properly given. This notice need not be proved to have been given in writing, or in any particular form; but may be inferred by the jury from facts and circumstances which shall warrant such inference.

The court also instructed the jury, that if they believed from

the evidence that two of the defendants, Going and Singleton, admitted that the debt sued for was a just debt, and that the said two defendants stated that they would try to arrange the payment thereof, out of the funds or effects that had been assigned by Daniel Greenleaf to James S. Douglass; and that the admission and declaration were made in 1830, and that at the said period no notice had been given by the plaintiffs to the defendants, that said guaranty had been accepted by them; and that said defendants were uninformed at the time of such admission and declaration of such failure to give such notice; that then such admission and declaration do not operate in law a waiver of, and dispense with the necessity of such notice.

The instruction must have been hastily drawn; but we understand it as laying down the principle that a recognition of their obligation to pay, by the defendants, under a supposed liability which did not exist, from the facts of the case, and of which facts they were ignorant; would not be a waiver of the notice. In this view, the instruction was correctly given.

And the court further instructed the jury, that in the absence of evidence of notice given in a reasonable time by the plaintiffs, that said letter of credit had been accepted by them, the mere acknowledgment by the defendants, that the debt sued for is a joint debt, does not dispense with the necessity of such notice: but that to dispense with such notice, there must be evidence of an express and unconditional promise by the defendants to pay, made under full knowledge that such notice had not been given.

This instruction is not founded on the supposition that the defendants were ignorant of the necessity of a notice to bind them; and this ignorance, therefore, cannot be presumed. The proposition then is, that although the defendants knew that a notice was necessary to bind them, and which had not been given: an acknowledgment of the debt and a promise to pay, which is not express and unconditional, would not dispense with notice. In giving this instruction, we think the court erred. A party to a note entitled to notice, may waive it by a promise to see it paid; or an acknowledgment that it must be paid; or a promise that "he will set the matter to rights;" or by a qualified promise, having knowledge of the laches of the holder. *Hopes v. Alder*, 6 East, 16; *Selw. N. P.* 323; *Haddock v. Beery*, 7 East, 233; *Rogers v. Stephens*, 2 T. R. 713; *Anson v. Baily*, Bul. N. P. 276. In the case of *Thornton v. Wym*, 1 Wheat. 183, this court say:

an acknowledgment of his liability, by the endorser of a bill or note, and knowledge of his discharge by the laches of the holder, will amount to a waiver of notice.

In their fourth instruction, the court say, that a qualified or conditional promise, made by the defendants to pay the debt sued for, which was rejected by the plaintiffs, or their agent, is not a waiver of the necessary notice from the plaintiffs to the defendants, that said letter of credit had been accepted by them.

This instruction is somewhat vague in its language; but if it is to be considered as laying down the rule, that a promise to pay the debt, qualified with a condition which was rejected by the plaintiffs, or their agent, the court were right in saying that it was not a waiver of notice.

In their fifth and last instruction, the court charge the jury that to enable the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor of the debt sued for; and in case of non-payment, notice should have been given in a reasonable time, to the defendants; and on failure of such proof, the defendants are in law discharged.

This instruction rests upon the necessity of a personal demand of Haring by the plaintiffs. It has been already shown that this demand was unnecessary in case of Haring's insolvency; the instruction was, therefore, on the facts in the case, erroneous. The judgment of the District Court must be reversed; and the cause remanded for a venire de novo.

Mr. Justice BALDWIN dissented.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the district of Mississippi, and was argued by counsel. On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said District Court, with directions to award a venire facias de novo.

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The principles which govern the law of notice are established, in accordance with the decision in *Lent v. Padeiford*, and the chief difficulty consists in their application. It is well known that those who make a promise of any sort, are bound to take all the steps necessary

for its fulfilment, and cannot rely on their own inability or supineness, as an excuse for withdrawing from the obligation which they have assumed, or imposing any part of it on those to whom the promise is made. This general rule applies with full force, where the obstacle to performance arises from the ignorance of the promisor, and charges him with the task of obtaining the information which he requires, at his own risk and peril. That one of the parties to a contract, is acquainted with facts which are unknown to the other, will not, therefore, make it the duty of the former to impart his knowledge, or render his omission to do so, a justification for a breach of engagement on the part of the latter. Hence, in order to render notice obligatory, and the failure to give it a bar, the facts must not only be without the knowledge of the defendant, and within that of the plaintiff; but the circumstances must be such as to reverse the ordinary relation, and make it incumbent on the one, to communicate that which the other is *prima facie* bound to ascertain for himself by inquiry.

To render the want of notice a defence, it must consequently appear not only that the plaintiff had the necessary information, but that the defendant could not reasonably be expected to obtain it by inquiry from others, or even from the plaintiff himself. *Hicks v. Goates*, Cro. Jac. 390; *Juxon v. Thornhill*, Cro. Car. 132. Thus all the precedents agree, that the defendant is bound to take notice of transactions between the plaintiff and third persons, who are named in the contract; although the case may be different when they are not named, and when he consequently has no clue to aid his inquiries. *Holmes v. Twist*, Hobart, 51; *Henning's Case*, Cro. Jac. 432; *Young v. Buron*, 3 Sneed. 80, 97; *McAuley v. Carter*, 22 Illinois, 55. Hence, where the defendant promised to pay the plaintiff thirty pounds, if he would deliver up a bond to a third person, notice of the delivery was held not to be essential to a recovery on the promise, because the person to whom the surrender was to be made was named in the contract, and the case was not within a principle, which only applies where the means of knowledge, are not accessible. *Smith v. Goff*, 2 L. Raym. 1126; 1 Salkeld, 457. And where the promise was to save the plaintiff harmless, from all debts and liabilities which he might incur at the request of the defendant's son, notice was held unnecessary, because the defendant might have asked information from his son if he desired it. *Somersall v. Barnaby*, Cro. Jac. 287. The rule is the same, whether the engagement be collateral and contingent, or direct and immediate; and hence a promise to pay the rent of a farm, if the tenant does not, may be enforced by the landlord without notice of the default of the tenant, because the promisor is bound to ascertain the true state of the case by inquiry, in order to fulfil the engagement into which he has entered. *Brookbank v. Taylor*, Cro. Jac. 685. And

notice has been said not to be essential, even when the liability of the defendant depends on the plaintiff's marriage, because that is an act too notorious and public, to come within the scope of a doctrine which only applies where the matter is secret, and knowledge cannot be obtained by investigation: *Crane v. Crampton*, Cro. Car. 34; while the case of *East v. Thoroughgood*, Cro. Eliz. 834, goes still further, by deciding, that an action may be brought on a promise to pay if the plaintiff dislikes certain land, without notice of his dissatisfaction. But this case is opposed by that of *Brable v. Holywell*, Cro. Eliz. 371, and is, at the best, somewhat doubtful.

These decisions, and the whole tenor of the English authorities, would seem to show, that the doctrine of notice was not a favorite with the common law, which was reluctant to turn suitors out of court, merely in consequence of their failure to aver that they had communicated intelligence of that, which might well have been known to the defendant, without his being able to prove it. And they leave no room to doubt the soundness of the decision in *Lent v. Padelford*, that he who stipulates for the acts of another, is bound to see that the latter fulfils the engagement made in his behalf, and may be held responsible for a failure to do so, without any previous notice of the default. The same question arose in *Hammond v. Gilmore's Administrators*, 14 Conn. 479, where an agreement had been entered into between the plaintiff and a third person, for the sale to the latter of a number of mulberry trees at a stipulated price, subject to a penalty of \$300 in case of a default by either party; and the suit was brought upon a guaranty by the defendant of the payment of this penalty, in case it should be incurred by the purchaser. The guarantor objected that he should have been notified of the default of the purchaser, and the consequent liability for the amount of the penalty. The court were, however, clearly of opinion, that as the event on which the liability of the defendant depended, was the act of a third person, he was bound to take notice of it at his peril, and was not entitled to postpone the performance of his contract, until the breach was communicated to him by the plaintiff. The general rule as to notice was said by Church, J., who delivered the opinion of the court, to be well settled, although there might be a difficulty in its application. "When the fact alleged in the pleading is to be considered as lying more properly or exclusively in the knowledge of the plaintiff than of the defendant, then the declaration ought to aver, that the defendant had notice thereof. This is a well settled rule of pleading. No one is bound to give notice to another of that which that other person may otherwise inform himself of. Nor is notice necessary, where the thing lies as much in the cognizance of one as of the other. 16 Vin. Arb. tit. Notice, P. 5, pl. 10. *The King v. Holland*, 5 Term Rep. 606. If an act is to be done to

a third person, or by a third person, who is known, no notice need be given. Laweson's Pl. 221; 1 Chitt. Pl. 320; 2 Wms. Saund. 62, n.; 3 Com. Dig. 675, tit. Pleading; 2 Salk. 457; 1 Swanst. Dig. 697; *Ward v. Henry*, 5 Connecticut Rep. 596; *Williams v. Granger*, 4 Day, 444; *Breed v. Hillhouse*, 7 Connecticut Rep. 523. In the present case, Gilmore was privy to the contract made by Hall: he, as well as Olmstead, knew its terms and its time of performance, and by an inquiry, could have ascertained whether a forfeiture against which he had himself stipulated, had been incurred. It was his duty, as surety, as Lord Eldon said, in the case of *Wright v. Simpson*, 6 Ves. jun. 734, to see to it, that his principal performed. Gilmore's guaranty was not of such a character as to bring it within the rule adopted by this court, in the case of *Craft v. Isham*, 13 Connecticut Rep. 28. That was a letter of credit—a guaranty of a debt to be created or not, as others should decide. It looked entirely to the future. The defendant in that case could not know until notified, whether his guaranty had been accepted or acted upon. Nor could he know whether the plaintiff intended to look to him, or to his immediate debtor, for payment of any possible balance remaining due."

This decision accords with the earlier precedents, and is well sustained by the best considered cases in modern times; *Bushnell v. Church*, 15 Conn. 406; *Lowe v. Beckwith*, 14 B. Monroe, 184; *Noyes v. Nichols*, 28 Vermont, 159; *Bushford v. Shaw*, 4 Ohio N. S. 268; *Vinal v. Richardson*, 13 Allen, 521, 532; *Rhode v. Green*, 26 Indiana, 83; *Train v. Jones*, 11 Vermont, 444; *Smith v. Ide*, 3 Id. 290; *Peck v. Barney*, 13 Id. 93; *The Bank v. Hammond*, 1 Richardson, 281; *Allen v. Rightmere*, 20 Johnson, 365; *Kemble v. Willis*, 10 Wend. 74; *Brown v. Curtis*, 2 Comstock, 225; *Thrasher v. Ely*, 2 Smedes & Marshall, 111; *Walton v. Mascall*, 13 M. & W. 72, 452; although authorities may be found, which follow a different rule, and will be hereafter cited.

The rule that notice need not be given, of any fact which the defendant can learn for himself, is founded in reasons of policy and justice, which apply with as much force to agreements under seal as to simple contracts. Thus, in *Douglass v. Howland*, 24 Wendell, 35, the action was brought on a covenant for the performance of an agreement by a third person, and the defence set up was, that the default of the latter had not been communicated to the covenantor. But this objection was overruled by the court, on the ground that a party who enters into a contract, is bound to inform himself of all that is necessary for its fulfilment. "The second point now made by the defendant is," said Cowen, J., "that no notice of Bingham's default was proved. The breach was in refusing to account, and to pay the money on the decree, though the plaintiff had done the several acts on his part re-

quired as a condition precedent to Bingham's liability attaching. Under such a state of things, it is not denied that Bingham himself was liable; and the defendant covenanted that he should perform and fulfil his obligations. If the defendant were liable at all, he was so without notice from the plaintiff. It is a general rule, that where one guaranties the act of another, though on condition, his liability is commensurate with that of his principal, and he is no more entitled to notice of the default than the latter. Both must take notice of the whole at their peril. *Somersall v. Barnaby*, Cro. Jac. 287; *Atkinson and Wolfe's Case*, 1 Leon. 105. These were cases of a promise to indemnify against liabilities to be incurred for another; and it was held that no notice of their being incurred was necessary, or that they had been paid. So where the defendant promises to pay what should appear to be due from the plaintiff to his attorney. *Pitman v. Biddlecombe*, 4 Mod. 230. In *Smith v. —*, 11 Id. 48, Holt, Ch. J., said, where either party can obtain notice on his own inquiry, there none need be given. 2 Salk. 457, S. C., nom. *Smith v. Goff*; *Harris v. Ferrand*, Hardr. 36, S. P. In *Brookbank v. Taylor*, Cro. Jac., 685, the promise was that the defendant would pay the plaintiff the rent due from another, if the latter did not pay it. Held, that the defendant must notice the non-payment at his peril. *Williams v. Granger*, 4 Day, 444, S. P. In all these and the like cases, if the defendant intend to insist on the notice or request, he must expressly make it a condition of his contract, as was done in *Berks v. Tippet*, 1 Saund. 32. Without such a precaution, the engagement is considered as absolute to pay on the happening of the condition. This was held of a promise to repay the plaintiff £20 if he disliked the article for which he had advanced the money. *East v. Thoroughgood*, Cro. Eliz. 834. This case I admit to be questionable, as the condition was a secret lying in the plaintiff's own breast; and the contrary has been several times resolved and seems to be settled, because the matter lies not only more properly but exclusively in the plaintiff's own knowledge. Comyn's Dig. Plead. C. 73 Condition L. 8, 9; *Brable v. Hollywell*, Cro. Eliz. 250; *Henning's Case*, Cro. Jac. 432; *Holmes v. Twist*, Hob. 51; 1 Rol. Abr. 463, S. C. at pl. 15; Id. pl. 18. But in the case at bar, the defendant had only to inquire of his principal, for whom he had undertaken absolutely that he should perform. The case is, therefore, stronger against him than any which have been cited. Add the familiar one of an award. If the submission expressly require notice, it must be given; otherwise the party must inquire of it, and pay the sum awarded at his peril, even though the whole proceedings were *ex parte*. 1 Chit. pl. 286, Am. ed. of 1828; *Harris v. Ferrand*, Hardr. 36; and see 1 Saund. 33, note (2) and the cases there cited; Comyn's Dig. Plead. C. 69."

A similar question arose in *Bush v. Critchfield*, 4 Hammond, 103, in a suit on a covenant, that if the plaintiff would supply one McConnel with merchandise for sale on commission, during the space of one year, the defendants would hold themselves responsible for the faithful performance of his duties as agent, during that time; and, also, for his fulfilling an agreement into which he had entered, to account for and pay over to the plaintiffs all the money which he might receive from the sales affected by him as their agent. The declaration averred a demand on McConnel, and a failure on his part to account or pay over, but contained no averment that notice of his default had been given to the defendants. The court held the declaration good, on the ground, that where a party is bound by a covenant or obligation for the acts of a stranger, notice of the default of the latter is unnecessary, because the covenantor is bound to take notice at his peril of the event upon which his liability depends.

These decisions are obviously sound, because, the breach and consequent right of action were complete as soon as default was made on the part of the principal, and no subsequent step could be requisite before bringing suit. *White v. Woodward*, 5 C. B. 810. But the rule applies, where the defendant contracts for a direct performance on his own part, and makes his undertaking depend on some contingent event, which is wholly extraneous to the duties imposed by the contract on himself. In *Huff v. Campbell*, 1 Stewart, 543, an action was brought upon a covenant to pay one hundred dollars, in case a third person therein named, should be acquitted of a charge of forgery through the exertions of the plaintiff. In this instance, the event on which the liability of the covenantor was to accrue, was not one for which he himself stipulated, so that the breach was not necessarily complete immediately upon the happening of the contingency. It was, however, decided, that as the precedent condition to be performed by the plaintiff, was one which might have been ascertained by proper investigation, the want of notice formed no obstacle to a recovery. In this instance, the nature of the condition on which the obligation of the defendant depended, was fixed by the terms of the contract; the only uncertainty being as to whether, and at what time, it would be accomplished by the plaintiff. There was, therefore, sufficient matter to guide the inquiries of the defendant, and enable him to learn whether it had been performed; and the general rule consequently held good, which compels him to ascertain everything which may be necessary for the fulfilment of the contract.

The same view was taken in the case of *Dir v. Flanders*, 1 New Hampshire, 246, where the contract being to return certain lottery tickets to the plaintiff, who was one of the managers of a lottery, or else to pay five dollars for each of them three days before the pe-



riod which should be named by him and the other managers, for the drawing of the lottery, the court held, that as the time of payment which was the only point left open by the terms of the agreement, was to be determined by a joint act of the plaintiff and other persons, which from its nature might easily be ascertained by the defendant, the want of express notice to the latter of the period of drawing, was no ground of defence to an action brought for the price of the tickets.

But although the duty of obtaining the information necessary for the performance of a promise devolves under ordinary circumstances upon him who makes it, there are, notwithstanding some instances, in which the nature and extent of the obligation which he has assumed, may be so far beyond his knowledge and so exclusively within that of the person to whom the promise is made, as to render it incumbent on the latter, to communicate the information he possesses for the benefit and guidance of the former. The rule is one of natural justice, which requires that those who seek to render others responsible for the non-performance of a contract or obligation, should not themselves withhold anything which is indispensably necessary for its accomplishment. This is emphatically true, where the liability imposed by the contract is uncertain, and depends for certainty upon the acts or declarations of the promisee, who may be bound under these circumstances, to acquaint the promisor with his determination, before charging him with the violation of a duty which was too vague and ill defined to admit of fulfilment. *Centre v. Centre*, 38 New Hampshire, 318; *Watson v. Walker*, 3 Foster, 471, 33 New Hampshire, 131; *Bashford v. Shaw*, 4 Ohio, N. S. 263; *Walker v. Forbes*, 25 Alabama, 139.

Certainty is an essential requisite to the validity of every contract at common law; and where, the nature and extent of the obligation are not ascertained in the first instance, no liability can arise until they are defined. *Morris v. Wadsworth*, 17 Wend. 103. Thus, where a purchaser promised to pay the highest price for certain weys of barley, which the vendor could obtain for the residue of his stock from other persons, notice of the rate of subsequent sales, was held to be a condition precedent to the right of suit on the contract, because it depended primarily upon the vendor's choice or determination, and could hardly be learned by the unassisted efforts of the vendee. *Henning's Case*, Cro. Jac. 422. So where the declaration averred, that in consideration the plaintiff would sell a ton of wood to the defendant, the latter agreed to pay for it at whatever rate should be obtained for other wood of the same sort from any one else, and then went on to aver that the rest of the wood had been sold at a specified rate, and that the defendant did not pay according to his promise, a judgment against the latter was reversed on error by the Exchequer Chamber, on the ground of the absence of any allegation, that the rate of the subse-

quent sales, which was a thing left to the option of the plaintiff, had been communicated by him to the defendant. *Holmes v. Twist*, Hobart, 51. And for a like reason a defendant who agrees to be answerable if the plaintiff approve of his references, is entitled to notice that the references are satisfactory, and will not be liable, unless it is given in due season. *Mozley v. Tinkler*, 1 C. M. R. 692; *Morten v. Marshall*, 2 Hurlstone & Coltman, 305.

Other instances may be found which illustrate the same doctrine; *Brable v. Holywell*, Cro. Jac. 250; *Id.* 571; *Richards v. Carvamel*, Hobart, 68; *Anonymous*, 3 Salkeld, 246; but the most important case on the subject in modern times, would seem to be that of *Vyse v. Wakefield*, 6 M. & W. 442. The action was brought against the defendant on a covenant that he would appear at any insurance office which the plaintiff might designate, and answer all questions which should be put to him with regard to his health in order that an insurance might be effected on his life; and would not afterwards do any act by which such insurance should be vitiated. The declaration further averred, that the defendant had appeared and answered certain questions so put to him at the Rock Life Insurance Company, and that the plaintiff had thereupon effected an insurance with that Company, conditioned to be void in case the defendant went beyond the limits of Europe, and then assigned as a breach, that the defendant did go beyond the limits of Europe, but without alleging that he had notice either of the terms and place of insurance, or of the condition which had been violated by his departure. A demurrer to the declaration for the want of an allegation, that the defendant had been notified of the terms of the policy, was met by the reply, that he was bound to take notice of everything requisite for the performance of the covenant, and that even if he was not, still notice should be presumed, from his appearance at the office where the insurance was effected and answering the questions put to him by the insurers. But, however just this inference might be in point of fact it obviously could not be drawn as one of law; and the court held that as the plaintiff was left free to determine where and on what terms he would insure, he was bound to give the defendant information how his choice had been exercised before treating the latter as a defaulter for not fulfilling a condition of the nature of which he might be ignorant. On this point the language of Parke, Baron, is sufficiently striking to deserve particular attention. "The general rule," said that acute judge, "is, that a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something,

but the act on which the right to demand payment is to arise is perfectly indefinite; as in the case of *Haule v. Hemyng*, (Viner's Abr. 'Condition,' (A. d.), pl. 15; Cro. Jac. 422,) where a man promised to pay for certain weys of barley as much as he sold them for to any other man: there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and in such cases, the right of a defendant to a notice before he can be called on to pay, is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B., or perhaps on the marriage of B. alone (for there are some cases to that effect) or to pay such a sum to a certain person, or at such a rate as A. shall pay to B. In these cases there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at *some office* in London. Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the defendant the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case; for not only do the terms of the covenant apply to all actually existing companies of the sort, but all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition that appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice. And I think, therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office; it might then, perhaps, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected. If, therefore, the more extended construction of this covenant is to be adopted, and the defendant's contract understood to extend to all

existing and future companies, no doubt at all can exist upon the point. Supposing, however, that the covenant is to be construed in a limited sense, as restrained to any office where the party should have appeared to answer the questions relative to his health, &c., as the words 'such insurance' seem, and perhaps with truth, to indicate, even then the option of the plaintiff is of such an indefinite nature, that the defendant cannot be called on to account for the non-observance of it, unless notice be given to him. Now here none has been given; there is, it is true, notice of an intention to effect a policy, but none either of its having been made at all, or made with any particular conditions. Possibly, if it had been notified generally to the defendant that an insurance had been effected at a particular office, it would become his duty then to inquire into its nature and the conditions with which it was coupled; but I think that he was, at least, entitled to notice of the fact of its existence."

This decision, which was subsequently affirmed on error by the Exchequer Chamber; 7 M. & W. 126, clearly shows, that whenever the contingency on which the liability of one of the parties to a contract depends, rests exclusively within the knowledge of the other, the latter must communicate the information necessary for the guidance of the former, before he can be entitled to insist on performance; and the principle has been applied in a number of instances on this side of the Atlantic. *Pickett v. Cowden*, 18 Maryland, 412; *Center v. Center*, 38 New Hampshire, 318; *Bensley v. Atwell*, 12 California, 231. Thus, in *Walson v. Walker*, 3 Foster, 470, an agreement that if the plaintiffs would use due diligence through themselves and their agents, to effect sales of a patent right in Europe to the amount of \$1,000, clear of all expenses, and should they fail in doing so, that the defendants would either pay a sufficient sum to make up that amount, or assign one-half the patent, was held to make it incumbent on the plaintiffs, to give notice that their efforts to sell the patent had been unsuccessful, before charging the defendants with a breach in not making the assignment or paying the money. And where a deed of partition contained a covenant that if the title to the share set off to one party proved defective, and no recompense could be got from the original grantor, compensation should be made by the other, notice of the failure of the title and of the refusal of the grantor to pay the loss, were said to be conditions precedent to a right of action on the covenant. *Morris v. Wadsworth*, 17, Wend. 103. In like manner, where a manufacturer warranted a bell, which he sold, not to crack within a year, and promised that if it did, he would recast it, notice of the breach of the warranty was held essential to the right to enforce it, because the defendant could not reasonably be required to keep himself informed of the condition of the bell or be held to be in default for not recasting it, in the absence of

proof that he knew that it was cracked. *Hills v. Bannister*, 8 Cowen, 91.

The reasoning on which these decisions are founded, is in some measure applicable where a guaranty is given of the goodness of a debt, or that it may be collected by a recourse to legal proceedings against the debtor; because, under these circumstances, the guarantor is not liable, unless due diligence is used to collect the debt, nor until the measures taken for that purpose are brought to a conclusion, and have proved abortive. And, it has been held to follow, that as the contingency on which the guaranty depends, is necessarily known to the creditor, and is left to his choice or discretion, he is bound to communicate it to the guarantor and thus apprise the latter that the time has come for the performance of his engagement, before proceeding to enforce its fulfilment by action. *Grice v. Ricks*, 3 Devereux, 62; *Adcock v. Fleming*, 2 Dev. & Bat. 225; *Wolfe v. Brown*, 5 Ohio, N. S. 304. This conclusion is, however, somewhat questionable, and there will at all events be no need of notice when the principal becomes insolvent, and thus removes the necessity for proceeding against him at law, because his pecuniary condition lies equally open to the creditor and the guarantor. *Clarke v. Merriam*, 25 Conn. 577. The discordancy of decision on these and similar questions has arisen from a difference of interpretation rather than of principle, and would cease if the meaning of the parties were clearly expressed or ascertained. A guaranty that a debtor shall pay punctually, or that a contract fixing an exact time for performance, shall be kept according to its terms, is necessarily broken if the day goes by without payment or performance, and there can be no obligation to make a demand or give notice, but a general guaranty of a debt may be interpreted by a little stretch of ingenuity as a promise to save the creditor harmless, and thought to require proof that the money could not be collected by a demand or suit. And as the guarantor may have no sufficient means of knowing whether these steps have been taken, or with what result, he may ask to be told within a reasonable time and before action brought. A similar interpretation has been put on an undertaking for the faithful discharge of an agency, not specifying particular acts, and engaging broadly that the agent shall not be in default. See *Beebee v. Dudley*, 6 Foster 49; *McDougal v. Calef*, 34 New Hampshire, 534; *Kain v. Jones*, 11 Vermont, 444; *Schlessinger v. Dickenson*, 5 Allen, 47.

Cases may occur in this, as well as in most other branches of the law, which lie near the boundaries of opposing principles, and may consequently be claimed as subject to either although they can only be legitimately ruled by one. Thus, in *Colt v. Root*, 17 Mass. 229, the deposit of a note in the hands of a third person named in the contract, by the plaintiff, and in *Weigley v. Wier*, 7 S. & R. 309, the institution

of a suit against him, were held to be events immediately within his own knowledge, and of which he must give notice to the defendant. But these decisions seem to transcend the well settled rule, that the possession of information will not render the communication of it a duty, unless it could not have been ascertained by inquiry; and they are plainly at variance with the cases of *Smith v. Goff* and *Somersall v. Barneby* (ante, 60).

Although in general, notice need not be given of the acts of a third person, it has been said that where the event on which the liability of the defendant hangs, rests peculiarly within the knowledge, or depends upon the option of an agent chosen by the plaintiff, the effect should be the same as where it is known only to the plaintiff himself. Accordingly it was held in the case of *Lewis v. Bradley*, 2 Iredell, 303, that in a suit brought on an agreement to make good all sums which could not be collected on certain notes assigned in payment of a debt, as soon as they should be returned by any constable chosen by the assignee as incapable of collection, there could be no recovery without an averment and proof, that notice of the failure of the officer in whose hands they were placed to obtain payment upon them had been given to the defendant; and a similar decision was made by the Supreme Court of Vermont in *Sylvester v. Downing*, 18 Vermont, 32.

Notice need not, however, be given of the act by which a contract originally uncertain is reduced to certainty, where it is one that might be ascertained by proper effort. And hence, even when a subsequent notification is necessary to complete or give precision to the agreement, it will ordinarily be sufficient to apprise the principal without seeking out and warning the guarantor. *Bushnell v. Church*, 15 Conn. 114; and *The Protection Ins. Co. v. Davis*, 5 Allen, 54.

The object of notice has been shown to be the communication of intelligence known to one of the parties, and necessary for the fulfilment of the duties assumed by the other; and hence it may ordinarily be given at any time before the period for the performance of the contract arrives, and while the obligation to perform it still continues. *Paige v. Parker*, 8 Grey, 211. When, therefore, the period during which the obligation of a contract will endure is limited by its terms, notice must be given before that period expires, but when it is not, the effect of delay will simply be to suspend the right of suit until the necessary information is communicated. Thus, where the stipulation was that if the title to a lot of land proved defective and no recompense could be obtained from the grantor, compensation should be made by the defendant, the plaintiff was allowed to recover on proof that the facts which entitled him to an indemnity were made known to the defendant before action brought; although the default was held not to be complete until

then, and interest was consequently refused for the antecedent period; 17 Wend. 103. And it may be presumed, that although the failure to acquaint the defendant in *Vyse v. Wakefield*, with the conditions of the insurance which had been effected on his life, was a sufficient reason why he should not be held liable for violating them, while ignorant of their existence, it would have been no justification, for a disregard of his covenant, after he had been apprised of what was necessary to be done in order to keep it. Ignorance of the nature and extent of an obligation may be an excuse for a breach committed while it lasts, but will not justify a breach committed with full knowledge. Hence, the only case in which delay in giving notice can operate as a bar, is where the obligation of the contract is confined within certain limits, and ceases before the notice is given. When, however, notice is not given until the contract is at an end, and the defendant is released from its performance, it will obviously be too late to found or complete the right of action. Thus, on recurring to the case of *Vyse v. Wakefield*, we shall find, that although the covenant of the defendant was not limited in terms, the insurance effected on his life had been avoided by the breach of its conditions, before he was informed of what they were, and that a subsequent notice would consequently have been ineffectual, unless the forfeiture was waived. And when the contract of the defendant binds him to performance within a limited period and not afterwards, he must have notice before that period expires, because there can be no default after the obligation of the contract is at an end, nor before the communication of the intelligence necessary for its fulfilment. When, therefore, the promise declared on was to repay the plaintiff before the end of a fair, as much as he should expend for the support of the defendant and another during its continuance, it was held that there could be no recovery, unless notice of the amount expended was given before the fair terminated, because the defendant was not bound to make the payment, either after that period, or before receiving information of the amount of his liability; *Beresford v. Goodrouse*, Rolle's Abridg. Condition, 469, D. pl. 3. So the parties to any contract, are entitled to restrict the period at which notice shall be given, within certain limits; and that when this has been done, there can be no recovery, unless the stipulation is complied with; *Thomas v. Davis*, 14, Pick. 353. But these decisions form no precedent for cases where the promise relied on is a general undertaking to pay when notified, or for payment by a third person where no precise limits are set to the period of performance.

This view of the law is supported by the precedents in the most approved treatises on pleading, and by the recent case of *White v. Woodward*, 5 C. B. 810, where a demurrer to a declaration on a guaranty on the ground that notice was alleged generally without specify

ing time or place, and that it should at least be averred to have been given within a reasonable time, was overruled by the court, who held that no averment of notice was necessary, and that if there had been such delay in giving notice as to be productive of injury and thus constitute a defence, it must be specially pleaded. In *Watson v. Walker*, 3 Foster, 470; 33 New Hampshire, 131, however, where the contract was to make good any deficiency, which might occur in certain sales which the plaintiffs had agreed to make in Europe, by the payment of money or the transfer of one-half of a patent, in the United States, the court held that notice of the deficiency must be averred and proved to have been given within a reasonable time after it happened, because the defendants might otherwise be compelled to abstain from selling their patent, during an indefinite period, to their own injury and without any corresponding benefit to the plaintiff. The only authority adduced in support of this position was Comyn's Digest, title Pleader, C. 74, which is a mere citation of the case of *Beresford v. Goodrouse*, above cited from Rolle, that the information necessary for the fulfilment of an engagement, must be communicated before the time fixed for its performance expires, and has no application to contracts which stipulate for performance on request, or a general performance. And the better opinion would seem to be, as stated above, that it is ordinarily sufficient to show that notice was given while the obligation of the contract was still in force, and in sufficient time to enable the defendant to avoid the default for which the plaintiff seeks to recover, and that any injury which may have resulted from not giving it sooner, must be shown by plea. Thus, although the failure of the plaintiff in *Watson v. Walker*, to give information of the deficiency in the sales made abroad, within a reasonable time after it was ascertained, might obviously have been a reason for exonerating the defendants from the performance of the contract, if a sale of the patent had been made, or any other material change of circumstances had occurred in the interval, it would hardly have justified them in refusing to fulfil their engagement, if they sustained no injury by the delay, and things remained on the same footing as when the contract was executed. Hence, the result of the cases would seem to be, that a man who makes a promise depending on a contingency which lies exclusively within the knowledge of the promisee, will be bound to keep it when informed that the contingency has arisen, notwithstanding a want of diligence in giving him the information, unless the delay is productive of some actual injury, which must be shown in pleading or evidence, and will not be presumed by the law. *Vinal v. Richardson*, 13 Allen, 521, 532. The point is well settled with reference to notice of the default of the principal in suits against guarantors; *Watson v. Mascal*, 13 M. & W. 72, 452; *Hitchcock v. Humphrey*, 5 M. & G. 559; *White v. Woodward*, 5 C. B. 510; *The Louisville Man. Co. v.*



*Welch*, 10 Howard, 461 (post); *Vinal v. Richardson*, 13 Allen, 521, 528; and should be held the same way whenever the question arises whether delay in 'giving the information necessary' for the performance of a contract, operated as an extinguishment of the obligation.

When notice is essential to complete the obligation of the defendant, or render non-performance on his part a default, it must, as the case of *Tyse v. Wakefield* (ante, 66), shows, be set forth with the requisite certainty in the declaration, and the rule was so held in *Illsley v. Jones*, 12 Gray, 260, although the circumstances hardly justified its application. What degree of certainty is requisite depends on the terms and nature of the contract; but it will ordinarily be sufficient to state that the defendant was notified within a reasonable time, or to name the time and place of notice with a *videlicet*, and then prove notice at any time before suit. Indeed, many of the precedents go further, and to the extent that an averment that the defendant had notice of the premises will suffice, without stating time or place, unless something appears on the face of the pleadings to make greater certainty requisite. And this would seem to be the rule subject to the modifications requisite in particular instances. For while it is no doubt true in general, that when no time is fixed by the parties, performance must be averred to have been within a reasonable time; this rule does not apply when time is immaterial, and one time as reasonable as another. The better opinion would therefore seem to be, that the question whether notice should be alleged generally, or with certainty of time and place, depends on whether there is anything in the terms of the contract rendering time and place material to the validity of the notice; and that when such is not the case, a general allegation of notice will be sufficient to throw the burden of showing that it was not given in due season on the defendant, who may plead the delay in bar of the action or in mitigation of damages; *Thrasher v. Ely*, 2 Smedes & Marshall; *Williams v. Stanton*, 5 Id. 347; *Morris v. Wadsworth*, 17 Wend. 103; *Fay v. Hall*, 25 Alabama, 704. And there is a large class of cases where the want of notice is only material as tending, in connection with loss of time and injury, to show negligence. Under these circumstances notice need not be averred or proved, although the failure to give it may operate as a defence. *Vinal v. Richardson*, 13 Allen, 521, 528. A failure to demand payment at maturity and give notice of non-payment to the guarantor, followed by the insolvency of the maker or acceptor, will accordingly, under some of the decisions, be a good answer to an action on a guaranty of a promissory note or bill of exchange, *post*. But this rests on grounds distinct from those rendering notice requisite at common law.

The case of *Watson v. Walker* (ante, 72), is, notwithstanding, sustained as a rule of commercial if not of common law, by the reasoning

of the court in *Douglass v. Reynolds* (ante, 48), and by a great number of cases which establish, in accordance with the language held in that decision, that notice must be given within a reasonable time, and that the failure to do so will operate as a defence, at all events, where the circumstances or condition of the parties have undergone a change in the interval, of a nature to prejudice the interest of the defendant, and deprive him of the means of security or compensation; *Cremer v. Higginson*, 1 Mayson, 523; *Massey v. Rayner*, 22 Pick. 223 (post). And some of the cases take the ground which is, notwithstanding, denied in others, that notice must be alleged with all the certainty as to time and place requisite for other material and traversable allegations; *Rapelye v. Bailey*, 3 Conn. 438; *Lawson v. Townes*, 2 Alabama, 373.

It is, however, hardly too much to say, that a delay in giving notice is immaterial under all the best considered cases, unless made so by circumstances, which must be pleaded or proved by the defendant, if they do not appear on the face of the declaration; *Paige v. Parker*, 8 Gray, 211. Thus, in *Fay v. Hall*, 25 Alabama, 704, the court qualified their decision in *Lawson v. Townes*, by holding that the question whether the notice came too late was one of evidence to be determined at the trial, and that the declaration did not fail in not averring that the defendant had notice within a reasonable time.

The rule which requires certainty of allegation, will, however be applied to averments of notice, whenever the nature of the case requires it. Thus, a declaration against an executor, which avers generally that he had notice, without saying that he received it after the death of the testator will be bad even after verdict; *Gill v. Drath*, Cro. Jac. 381; Hobart, 92; because those who act as agents or trustees for others, are not bound to remember in their fiduciary capacity, what they may have learned while dealing for themselves. The soundness of the principle is obvious, although the objection might now be obviated by the finding of a jury, if not taken by demurrer; 1 Chitty's Pleading, 329. But, although a vague or general averment of notice may be aided by verdict, the cases of *Wigley v. Weir*, 7 S. & R. 309; *Colt v. Root*, 17 Mass. 229; and *Crocker v. Gilbert*, 9 Cushing 151; would seem to go too far in applying this rule where the allegation is omitted; and the better opinion would seem to be, that the defect in such cases will survive the trial, and be fatal on a writ of error or motion in arrest of judgment; *Henning's Case*, Cro. Jac. 372; *Holmes v. Twist*, Hobart, 51. And whatever doubt may be entertained on this point, there can be none that the sufficiency of the notice must be shown, with reasonable precision, even when nothing need be said as to the time or place at which it was given, nor that to make a general averment that the defendant had notice

of the premises, sufficient, the premises must set forth all that it was necessary for him to know., *Fay v. Hall*, 25 Ala. 704; *Walker v. Forbes*, Ib. 139.

The doctrine that notice must be given, when the liability of one of the parties to a contract depends upon the will or choice of the other, has been applied in this country in a series of decisions, of which the case of *Douglass v. Reynolds* may be taken as a type, to the case of letters of credit or guaranties of future and contingent sales or advances. In most instruments of this sort, it is left to the choice of the party to whom they are addressed, whether he will accept them at all or to what amount; and they are sometimes mere general undertakings to be responsible to any one, who will give credit to the party for whose benefit they are intended. Under these circumstances, the difficulty of ascertaining what has been done under the guaranty, may often be sufficiently great, to throw a real obstacle in the way of an honest endeavor to ascertain the nature and extent of the obligation, with a view to its discharge or fulfilment, and it has therefore been held incumbent on those who act on the faith of the credit given by the guarantor, to give notice that they have done so, in time to enable him to meet his engagement. This course of decision seems to have had its origin in the case of *Clarke v. Russell*, 7 Cranch, 69, 72, where an attempt was made to render the defendant in the court below, liable on the language held in two letters addressed to the plaintiffs, one of which contained an assurance that a third person in whose behalf it was written, would comply with any engagement he might make, and the other a request to render him any assistance which might facilitate the objects which he had in view. It was said, under these circumstances, by Chief Justice Marshall, that if the letters had amounted to a guaranty, which he held they did not, it could not have been enforced without notice of the intention to rely upon it, and of the advances made on the faith of the request which it contained. More weight would have been due to this dictum, had it been essential to the question actually before the court; and this remark would seem equally applicable to the subsequent case of *Edmundston v. Drake*, 5 Peters, 624, where similar language was held, under the following state of circumstances.

A letter of credit was written to a commercial house in Havana, guarantying the payment of any purchases which might be effected through them, to the amount of forty thousand dollars. The firm addressed, being engaged in the execution of a similar contract, introduced the bearer to the plaintiffs by whom the proposed arrangement was carried out and a notification that such was the case sent to the guarantor, in which a particular mode of reimbursement by bills drawn on New York was indicated as the one chosen by the parties

Subsequently, however, a change was made in this arrangement without his knowledge, and bills on London substituted, which were protested in consequence of the failure of the drawers and a suit brought for indemnity, against the guarantor. In order to get over an objection founded on this alteration in the contract, which was alleged to be fatal to the right of recovery, it was argued for the plaintiff, that the notice was unnecessary, and might consequently be regarded as mere surplusage without effect on the rights of the parties. But it was held by Marshall, in accordance with the opinion, which he had expressed in *Russell v. Clarke*, that it would be an extraordinary departure from the exactness and precision which should distinguish commercial transactions, and which are important principles in the law and usage of merchants, if the writer of such a letter as that in question could be made answerable, without notice of the extent to which the propositions which it contained, had been acted on by the person to whom they were addressed.

Such a communication may be requisite where money is advanced or goods delivered to one man at the request and on behalf of another, because it will then be the duty of the agent to render an account forthwith to the principal, but the case is obviously very different where the relation between the person who makes the advance and the person at whose instance it is made, is that of a creditor and surety or guarantor, standing in distinct if not hostile attitudes and having no intimate or fiduciary relations. See Bell's Comm. Book 3, ch 2, sect 5; Story on Bills, sect. 463. The language of the court may, notwithstanding, have been just in view of the evidence, because if the original guaranty was limited to the persons to whom it was addressed, the case of the plaintiffs rested solely on the notice which they gave of their intention to act under it, and if it was not, they were bound to adhere to the terms suggested by themselves, and certainly could not vary them afterwards by appointing another place of payment without acquainting the defendant with the change.

Much of what is said on this case, and in *Russell v. Clarke*, with regard to the necessity for notice of the acceptance of prospective guaranties, may consequently be thought to fall without the line which separates the dicta of a court from its decisions, and to want the authority belonging to the judicial determination of points which are directly in controversy between the parties, and essential to the judgment pronounced in the cause. But the principles advanced on these occasions, were subsequently ratified and adopted in *Douglass v. Reynolds*, and have ever since been followed, not only by the Supreme Courts of the United States, but in most of the superior tribunals throughout the Union. The question arose in *Lee v. Dick*, 10 Peters,

2, where the rule which requires notice of the acceptance of future

and prospective guaranties, was held applicable to every engagement on behalf of another, although certain in amount and limited to a single transaction. The suit was brought on a guaranty contained in a letter addressed to the plaintiffs, and worded as follows: "Gentlemen:—Nightingale & Dexter, of Henry Co., Tenn., wish to draw on you at six and eight months. You will please accept their draft for \$2,000, and I do hereby guarantee the punctual repayment of it." No language could well be more precise than this, which conveyed a request to do a particular thing in a certain way, and contained a promise to be answerable if it was performed; while a letter addressed to P. B. Dexter, one of the firm of Nightingale and Dexter, and written on the same paper with the guaranty, removed a difficulty which might otherwise have arisen, by showing that the guarantor intended to make himself answerable to the extent of \$2,000 for the payment of a bill for a larger sum, which they proposed to draw, and which was drawn accordingly, and not to limit them to drawing for the precise sum covered by the guaranty. The contract was, therefore, certain in all material particulars, and left nothing open for future determination, save the question, whether the plaintiff would consent to give the credit; which might, and on common law principles ought, to have been ascertained by inquiry from the principal. But it was, notwithstanding, held that although a guaranty of an existing debt might be good without notice, the case was different where the engagement was for the repayment of future advances, which might be given or withheld at the discretion of the other party to the contract, who was said to be bound to give information of his intention to accept and act under the guaranty if not immediately, at least within a reasonable time after he received it.

In the subsequent case of *Adams v. Jones*, 12 Peters, 207, the guaranty was worded in the most general language, and consisted in an engagement, to be answerable for the payment of any merchandise, which might be purchased in New York, for the purpose of stocking a milliner's shop in another State. The promise was addressed to all the world, entitling every one to act upon the faith of the inducements which it held out; and it was accordingly held to be emphatically within the rule which entitles a guarantor to notice, because the defendant could neither know to whom he was liable nor for what amount, unless informed. "We are all of the opinion," said Story, who delivered the opinion of the court, "that notice is necessary; and that this is not now an open question in this court, after the decisions which have been made in *Russell v. Clarke*, 7 Cranch, 69; *Edmundson v. Drake*, 5 Peters' Rep. 624; *Douglass v. Reynolds*, 7 Peters' Rep. 113; *Lee v. Dick*, 10 Peters, 482; and again recognized at the present term, in the case of *Reynolds v. Douglass*. It is in itself a reasonable

rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity, to compel the other parties to discharge him from future responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom, and under what circumstances, the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given, and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the question were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

This decision may stand no better on technical grounds, than that of *Lee v. Dick*, but would seem more consistent with reason and justice, because the uncertainty extended to the parties as well as the amount, and the guarantor had no means of ascertaining the extent of his liability or the person to whom it had been incurred, except a recourse to his principal, who might have concealed or misstated the truth. It should, however, be remembered, that the terms of such agreements are, or may be dictated by those who give them, and if they do not think fit to require notice, the failure to give it should not be allowed to operate as a bar. *Vinal v. Richardson*, 13 Allen, 521. The guarantor holds out the principal as a person in whom he has entire confidence; the relation between them is *prima facie* intimate; and the creditor may reasonably suppose that the principal will do his duty, by communicating the transaction accurately to the guarantor. It was said with much force in *Meade v. McDowel*, 5 Binney, 195 that a man who authorizes another to contract for him, or what comes nearly to the same thing, agrees to be answerable for any contract which another may make, must be presumed to be cognizant of what is done under the power, and cannot require that notice should be given before action brought.

The immediate notice required in *Russell v. Clarke*, was reduced in these instances to notice within a reasonable time, which must seemingly, however, be computed from the date of the acceptance, and not from that of the advance. Whether a failure to comply with this condition cannot be excused by showing that the circumstances of the guarantor did not change during the interval, or that the delay was not injurious to the creditor, is not clear. A want of diligence is not ordinarily a bar unless it results in actual injury, and notice may be given at any time while the obligation of the contract endures and is

susceptible of being fulfilled. If notice of acceptance is an indispensable ingredient, without which the contract must fail for want of mutual assent, it should obviously be given forthwith, or at all events before goods are sold or advances made under the guaranty. See *Rapelye v. Bailey*, 3 Conn. 438; *The Bank v. Mitchell*, 15 Id. 206; *White v. Reed*, Id. 457; *Lawson v. Townes*, 2 Alabama, 373. On the other hand, if it be a mere act of diligence, designed to put the creditor on his guard, it will be enough to give it within a reasonable time, and before he has sustained any actual loss. *The Louisville Man. Co. v. Welsh*, 10 Howard, 461 (ante). In the latter aspect of the question proof that the principal was insolvent when the guaranty was given, or that if solvent then, he is still able to respond to any demand that may be made upon him by the guarantor, or that the latter has been indemnified by the principal, may obviously be material, as tending to rebut the presumption of injury. *Lawrence v. McCalmont*, 2 Howard, 426, 453; *Williams v. Stanton*, 5 Sanders & Marshall, 347; *Vinal v. Richardson*, 13 Allen, 521, 528.

The weight of authority accordingly seems to be that the question whether the creditor communicated his acceptance in due season, and what injury, if any, resulted from the delay, is a mixed question of law and fact, which must be left to the jury, under proper instructions from the court. *The Louisville Man. Co. v. Welsh*; *Lawrence v. McCalmont*; *Williams v. Stanton*.

These decisions are open to criticism on another point. At common law notice might be given at any time before suit brought, while the obligation of the defendant was still in force. It did not enter into or form a constituent part of the agreement, and was merely a means of giving certainty to a pre-existing obligation. When, however, the question arose in *Douglass v. Reynolds*, it was said that notice of the acceptance of a guarantee must be given in a reasonable time, and before any material change takes place in the situation of the parties. And the rule as developed by the subsequent course of decision, seems to be, that notice of the intention to accept and act under a guarantee, is an indispensable element, without which the *aggregatio mentium* necessary to a contract will not exist. This step led to another still further in advance of the common law. For as a communication made at the outset of the transaction, could not convey all the information which it might be desirable for the guarantor to have; it was held requisite to notify the creditor when the guaranty was acted on, and the credit given. *Noyes v. Nichols*, 2 Williams, 159; *Wildes v. Savage*, 1 Story, 22. It was accordingly said in *Cremer v. Higginson*, 1 Mason, 53, that a notification of the intention of the creditor to accept the guarantee, did not exonerate him from the duty of communicating the nature and extent of

the advance when made; and that although it might be enough to do this within a reasonable time, a delay of three years, and until after the principal became insolvent, was a defence to the action.

This decision was approved in *Douglass v. Reynolds*, with the qualification, that if the amount due under a continuing guaranty is made known when the transaction is concluded, it is not necessary to communicate each successive advance. In *Walker v. Forbes*, 25 Alabama, 147, the court said, that when the acceptance of the guaranty was made known, it became the duty of the guarantor to ascertain the amount advanced, and that it was enough for the creditor to demand payment when the debt matured, and give notice of his default.

It might have been thought that when the guarantor was told first that the guaranty was accepted, and next how much had been advanced, it would be his duty to see that the debt was paid without waiting for a third warning; see *Vinal v. Richardson*, 13 Allen, 521, 528; but the case of *Douglass v. Reynolds*, imposed the further obligation on the creditor of demanding payment from the debtor, and giving notice of his default to the guarantor, on pain of forfeiting the right to sue if the latter was prejudiced by the omission. The questions arising under this branch of rule will be considered in subsequent pages of this note.

Notwithstanding the objections, which may be made on these and other grounds to the doctrine that notice is essential to complete the obligation of prospective and contingent guaranties, it has been adopted by many of the State tribunals, and is now well settled in New England, Pennsylvania, Ohio, Missouri, Kentucky, Alabama, and some other parts of the Union. *Massey v. Rayner*, 22 Pick. 223; *Babcock v. Bryant*, Id. 133; *Kay v. Allen*, 9 Barr, 320; *Kellogg v. Stockton*, 5 Casey, 460; *Kincheloe v. Holmes*, 7 B. Monroe, 5; *Lowe v. Beckwith*, 14 Id. 184; *Bell v. Kellar*, 13 Id. 381; *Wardlaw v. Harrison*, 11 Richardson, 626; *McCullum v. Cushing*, 22 Arkansas, 520; *Taylor v. Wetmore*, 10 Ohio, 490; *Rankin v. Childs*, 9 Missouri, 674; *Lawson v. Townes*, 2 Alabama, 373; *Walker v. Forbes*, 25 Id. 139; *Fay v. Hall*, Id. 704; *Sollee v. Meugy*, 1 Bailey, 620; *Hill v. Colvin*, 4 Howard's Mississippi, 231; *McQuewans v. Hamlins*, 6 Casey, 215.

The question arose, at a comparatively early period, in *Ropelye v. Bailey*, 3 Conn. 438, where a suit was brought to recover an indemnity for advances made by the plaintiff, on the faith of a letter, written by the defendant, which concluded in these words: "Should you be disposed to furnish my brother with such goods as he may call for from three hundred to five hundred dollars' worth, I will hold myself accountable for the payment, should he not pay as he and you may agree."

The court said that as the guaranty was conditioned on a future



and uncertain event lying immediately within the knowledge of the plaintiff, it was his duty to notify the defendant before holding him responsible for a default which might be due to his ignorance of what it was incumbent on him to perform. It was also held, on the authority of *Russell v. Clarke's Executors*, that notice of acceptance was essential to the obligation of the guaranty, which could not be enforced unless the creditor gave immediate information of his intention to make the advance required.

The duty of notice was also enforced in *Norton v. Eastman*, 4 Greenleaf, 521; and again in *Sower v. Bradley*, 6 Id., where *Norton v. Eastman* was said to determine that notice of acceptance must be given at once, or, at all events within a reasonable time. But it was at the same time held, that the only motive for requiring it, is to enable the guarantor to protect himself against loss, and that when the circumstances of the principal remain the same, delay will be immaterial, unless the lapse of time is so great as to justify a presumption that the claim has been abandoned; and the language of the court tends to justify the inference, that knowledge derived from facts and circumstances at any time before action brought, will be equivalent to notice, if the guarantor is not prejudiced by the want of earlier information. In *Tuckerman v. French*, 7 Greenleaf, 115, the guaranty was couched in the following language:

"Messrs. W. & G. Tuckerman,

Gentlemen:—For the bill of goods which Mr. Charles B. Prescott bought of you on the 6th inst., I hold myself responsible to you for payment, agreeably to the contract made with him; and I will hold myself responsible for any goods which you may sell to him, provided the amount does not exceed five hundred dollars."

The goods mentioned in the first part of this writing, were subsequently paid for by Prescott, so that the case turned upon the effect of the second clause, and the rights of the parties under it. This was said to be in the nature of a continuing guaranty; but the plaintiff was nonsuited because he did not give notice of the acceptance of the guaranty, or the subsequent sale and delivery of the goods. A similar decision was made in *Bradley v. Cary*, 8 Maine, 234.

In *Craft v. Isham*, 13 Conn. 28, the doctrine was reviewed by the Supreme Court of Connecticut, who adhered to the principles which had been advanced by that tribunal in *Rapelye v. Bailey*. The wording of the guaranty on which the suit was brought, was as follows:

"Messrs. W. E. & J. F. Craft,

Gentlemen:—Understanding from J. B. Turner that he has some proposals from your brother, Mr. J. F. Craft, to assist him in his business, if he could procure some friend to be responsible for a part of what should be advanced (say one thousand dollars) at the end of three

years, I take this opportunity to thank you for these friendly offers to Mr. T.; and I will willingly hold myself responsible to you for the above amount, provided Mr. T. should fail to pay at the end of said term of three years."

Various parcels of goods were sold by the persons to whom this guaranty was addressed, in the course of the year 1832, but these sales and the extent of the liability which had accrued under them, were not communicated to the guarantor, until the month of November, 1835. The principal became insolvent during the interval and left the State. The judge before whom the cause was tried, instructed the jury that notice had not been given within a reasonable time after the sale, and that their verdict must therefore be for the defendant. On a subsequent motion for a new trial, this position was sustained by the court in banc, who held there could be no recovery in such cases, unless the defendant was notified within a reasonable time, to be determined by the court, and not by the jury. On the former point, the decision was based on the rule that matters uncertain in themselves, and depending for certainty on subsequent events more immediately within the knowledge of one of the parties to a contract, must be communicated to the other before holding him in default. The doctrine of promissory notes and bills of exchange was cited as analogous, and it was said that if an endorser was entitled to immediate notice, it should be sent within a reasonable time to a guarantor.

In *Train v. Jones*, 11 Verm. 444, the Supreme Court of Vermont held that notice of acceptance was not necessary to bind the guarantor, and Redfield, J., observed that if a promise to be answerable for the future acts or engagements of another was conditional in the proper sense of the term, which he appeared to doubt, the condition was one of which the defendant might take notice as well as the plaintiff; and that he knew of common law decision in which notice of the acceptance of such a guaranty had been held requisite. But the subsequent case of *Oaks v. Heller*, 13 Verm. 106; 16 Id. 63; and *Lowry v. Adams*, 22 Id. 166, sacrificed this plain and logical principle to the authority of *Russell v. Clarke*, and *Douglass v. Reynolds*, by holding that notice of acceptance is an essential element, without which a guaranty of future advances is a proposal or offer, not a contract.

It was held in like manner by the Supreme Court of Massachusetts, in *Babcock v. Bryant*, 12 Pick. 133, that a promise to pay for such goods as may be delivered to a third person is not binding, unless notice is given within a reasonable time. But the court expressed an opinion, that delay in giving the notice is not material, unless a change occurs in the position of the principal, or the guarantor is prejudiced in some other way, and seem to have thought that the plaintiff might still recover by discontinuing the suit, communicating the requisite informa-

tion, and bringing another action. The necessity for notice within a reasonable time, was again held in the subsequent case of *Mussey v. Rayner*, 22 Pick. 223, where a guaranty drawn in the most general terms, and not addressed to any particular person, contained an agreement to be answerable for the faithful performance of any contract into which the son of the guarantor might enter, for the purchase of books, with the view of establishing himself in business as a bookseller. The plaintiff, sold to the son on the faith of this promise, at different times, between the 12th October, 1831, and the 20th February, 1834, but did not communicate what he had done to the father, or inform him of his liability under the guaranty, until the month of July of the last mentioned year.

It was held under these circumstances, which were submitted to the court on a case stated, that notice was essential to the right of action, and that the defendant was discharged by the failure of the plaintiff to give it within a reasonable time. If there be any principle which exonerates a guarantor from the duty of obtaining the information necessary for the performance of the contract, at his own risk and peril, and charges the creditor with the task of acquainting him with every thing which it is material for him to know, this case was eminently fitted for its application. But we may be allowed to believe, that if notice is necessary, under such circumstances, it may be given at any time before action brought, unless sufficient cause is shown for an opposite conclusion. Lapse of time may be material where it results in injury, or is made so by a statute, but is not, in itself, a bar, either at law or in equity.

The doctrine of notice, and the question when it should be viewed as essential to the right of recovery on a commercial guaranty, were elaborately reviewed in the case of *Wilde v. Savage*, 1 Story, 22. In that case, one Bruce obtained advances from the plaintiffs in the spring of the year 1836 in the shape of bills of exchange, on the faith of an undertaking on his part, to put them in funds to meet the bills as they should fall due, and also of a written guaranty from the defendant to the extent of five hundred pounds for the punctual performance of the agreement. As an additional security, it was further agreed between the parties that certain teas, which were to be purchased with the proceeds of the bills, should be consigned to the plaintiffs for sale, with an understanding that, in case of default, they should be entitled to reimburse themselves out of the proceeds. Bruce became insolvent in the month of November, 1836, and in October, 1837, the plaintiffs notified him that the bills which had been drawn in pursuance of the original arrangement, were about to fall due, and requested him to provide the means of payment. Upon his default, they proceeded to reimburse themselves, as far as practicable, by the sale of the teas; and,

after another fruitless demand of payment addressed to Bruce, brought suit on the guaranty for the residue of the debt. It appeared from the evidence that no notice had been given to the defendant, either of the transactions which took place subsequently to the guaranty, or of the failure of Bruce to take up the bills, until the fall of 1838,—nearly a year after the first default on the part of the latter, although before the sale of the teas held as security. Among other grounds of defence it was contended that the guaranty was discharged by the delay in giving notice. On this latter point, the decision of Story, J., is given in full, as containing the conclusion finally reached, by the judge who first gave the doctrine an assured position in American law.

“The remaining point is that alone upon which any difficulty can be entertained. It is, whether the plaintiffs (Wildes & Co.) have lost their recourse over against the defendant upon his guaranty, by their omission, to give him notice, at an earlier period, of the neglect of Bruce to pay the money due, according to his engagement, upon the bill for £2,000. And here it is important to advert to the dates of some of the material transactions. The letter of credit was given on the 7th of June, 1836. Bruce became insolvent, and made a general assignment of his property on the 28th of November, 1836, and the defendant became a party to that assignment on the day of its date. The bill of exchange was drawn by Russell & Co., at Canton, on the 20th of April, 1837, at six months’ sight. The plaintiffs (Wildes & Co.) suspended payment on the 2d and 5th of June, 1837. The bill was remitted to them by Russell & Co., and was received by the plaintiffs, and passed to the credit of Russell & Co., about the 6th of October, 1837, the latter being then indebted to the plaintiffs in a large amount. On the same 6th of October, 1837, the plaintiffs duly notified to Bruce the receipt of the bill, and that it would fall due on the 8th of April, 1838, and requested him to provide for the payment thereof accordingly. No provision was made by Bruce for the payment of the bill at its maturity. On the 5th of May, 1838, Austin, as agent of the plaintiffs, made a formal demand on Bruce for the fulfilment of his engagement, and stated to him that the bill had been received, and passed to the account of Russell & Co. by the plaintiffs. Bruce made no reply. Afterwards, in December, 1838, Austin gave notice to Bruce of his intention to sell the teas, which were held by him as security for the payment; and the teas were accordingly sold, and the sales completed in January, 1839. In the autumn of 1838, probably in October, Austin notified the defendant that the teas were on sale, and would probably leave a deficiency beyond the £500, for which the plaintiffs would look to him, upon his guaranty. The defendant replied in terms neither admitting nor denying his liability. A formal demand was afterwards made, in March, 1839, upon the defendant, for the amount of his guaranty, which he

declined paying; and the present suit has been since commenced therefor.

"It is upon this posture of the substantial facts (for I omit any reference to others, which have not, in my judgment, any bearing upon the merits of the present case), that the question arises, whether the plaintiffs are entitled to recover, no notice of the default of Bruce having been given to the defendant until the autumn of 1838.

"It was said at the argument, that in cases of guaranty of future advances, to be made to another person, notice must be given to the guarantor by the party making the advance, that he accepts the guaranty, and consents to make the advances; and also notice, that he has made the advances, and acted upon the guaranty; and, lastly, notice that he has made a due demand upon the debtor, and his refusal to pay the amount when due. The two former, it is added, are conditions precedent to the legal operation of the guaranty; and if not duly given, the guarantor is not bound by his guaranty, whether he suffers any damage or not. The notice of the non-payment, it is admitted, is not a condition precedent; but it must be given in a reasonable time, and if the guarantor suffers any damage from the default of the creditor, he will, at least to the extent of that damage, be exonerated.

"I admit, that upon every guaranty for future advances, it is the duty of the party making the advances to give notice to the guarantor of his acceptance thereof, and of his consent to act under the guaranty, and to make the advances. This is conclusively established by the decisions of the Supreme Court, in *Russell v. Clarke*, 7 Cranch, R. 69; *Edmundston v. Drake*, 5 Peters, R. 624; *Douglass v. Reynolds*, 7 Id. 113; *Lee v. Dick*, 10 Id. 482; *Adams v. Jones*, 12 Id. 207; and *Reynolds v. Douglass*, Id. 497. This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof. And at all events, here there was due notice of an agreement to give the credit, and to make the advances contemplated by the guaranty.

"Upon the other point, I have more difficulty in yielding to the argument. Where a guaranty is accepted, and notice has been duly given to the guarantor that the party will act upon it, and give credit and make advances accordingly, I am not aware that it has ever been held that it was indispensable in all cases to give another and further distinct notice to the guarantor of the amount of the advances actually made, and the terms upon which they have been made, when the transaction is completed. All that I have supposed to be generally required of the person making the advances or giving the credit, after having given due notice of his acceptance and intention to act upon the guaranty, is, to make a demand upon the debtor when the credit

has expired, or the amount has become due, and, upon his default, to give notice thereof within a reasonable time afterwards to the guarantor. There is no case, to my knowledge, which goes the length that there should be three substantive or distinct notices in all cases, as contended for at the argument; and, as an original question, I should not be disposed to entertain it; since it would throw such arduous duties on the guarantee (as I desire to call the party accepting the guaranty) as would materially tend to impair the utility and convenience of that instrument. I do not mean to say that there are not, or may not be particular cases of guaranty, in which such notice may be required. Thus, for example, in such a case as *Cremier v. Higginson*, 1 Mason, R. 323, where advances were contemplated upon certain future contingencies, which might or might not arise, it might be proper to hold that some notice should be given to the guarantor within a reasonable time (notwithstanding he had already signified in general terms a willingness to make the advances, if they should be required,) that the contingencies had arisen, and the advances had been made, and the guaranty was relied on; for otherwise the guarantor might not definitely know, whether, under such circumstances, the guaranty was acted upon or not. So in the case of *Douglass v Reynolds*, 7 Peters, R. 113, 127, where there was a continuing guaranty for advances, acceptances, and endorsements to be made by the party in future, it would seem but reasonable, that when the whole transactions are closed, notice of the whole amount, for which the guarantor is held responsible, should be communicated to him within a reasonable time afterwards. The same rule might well apply to a single transaction, such as a single advance, or acceptance, or endorsement, where, from the nature and objects of the guaranty, the guarantor could not otherwise have any means of knowing the extent of his guaranty as to time, amount or other particulars, essential to guide his future conduct, and to ascertain and fix his responsibility. All such cases must stand upon their own circumstances; and do not seem to furnish just grounds for a general rule. But, without saying what is or ought to be the general rule, it seems to me that the doctrine can never properly apply to a case circumstanced as the present, where all the persons are originally privy to the whole transaction; where the case rests upon a letter of credit for a limited amount, to be drawn within a fixed time, and, subject to these restrictions, where the sums for which the drafts are to be drawn, and the time when drawn, are to depend upon the action of the debtor, and the guarantor is a party to the whole of the original contract. In such a case the guarantor has as good means of knowledge and inquiry as the guarantee, and it is quite as much his duty to make such inquiries as it is of the guarantee to give him notice of

the subsequent facts. If he omits to make any inquiries, he may properly attribute any loss, which he may sustain thereby, to his own laches, or want of vigilance, or to his own confidence in the debtor, and not to any disregard of duty on the other side. In the present case, it is impossible to avoid seeing that the letter of credit was for a limited time (eighteen months), after which no advances made would bind the guarantor; that the amount was not to exceed £2,000; that all the bills were to be drawn in China at six months, sight on London; that the sole object of the letter of credit and advances was to assist the operations of Bruce in a projected enterprise or voyage from Boston to the East Indies and back; that it was contemplated that the bills would not become payable until a very long period after the time when the guaranty was given; that the return cargo was relied on, as the immediate fund by which the advances were to be primarily secured; and that the guarantee was to be merely an auxiliary security. It seems to me, that under such circumstances, no further notice of the actual advances made was necessary to be given to the defendant, until the same became due from Bruce, and there had been some default on his part. The defendant, if he wished any information as to the progress or consummation of the voyage, could readily institute the proper inquiries. I am not prepared, therefore, to admit, that under the circumstances of the present case, there was any duty on the part of the plaintiffs to give notice to the defendant of the fact of the bill of £2,000 being drawn upon them and received by them, and passed to the account of Russell & Co., before the maturity of the bill and the default of Bruce in not paying the same. If it had been the duty of the plaintiffs to give such notice, under such circumstances, I should still say that it would not discharge the guaranty, unless the defendant could show that he had suffered some damage from the want of such notice. Indeed, the rights and duties of parties to guaranties must, from the variety of circumstances under which they have been entered into, be materially governed by the particular circumstances of each case. Lord Tenterden held this doctrine in *Van Wart v. Wooley*, 2 Barn. & Cressw. R. 439, 447, to which I shall presently have occasion to refer for another purpose.

"It appears to me, then, that the whole question in this case turns, upon the point, whether the defendant has received notice of the default of Bruce and the non-payment of the bill, within a reasonable time; and, if he has not, whether he is discharged from his guaranty, unless he has sustained some damage from the want of such notice. I take the doctrine to be clearly settled, that upon a guaranty to discharge the guarantor, there must not only be a want of notice within a reasonable time, but there must also be some loss, or damage sustained by the

guarantor; and that if there be a loss or damage, that the guaranty is not totally discharged, but only pro tanto to the amount of the loss or damage. The case is consequently distinguished in the authorities from that of an endorser to negotiable paper. The latter is entitled to strict notice; the guarantor is entitled only to notice, when he is or may be prejudiced by the want of it. If the debtor is solvent when the money becomes due, and no notice is given to the guarantor, and the debtor afterwards and before notice becomes insolvent, the guaranty is discharged. But where the notice would be of no avail, and the guarantor has suffered and can suffer no damage by the want of notice, he is not discharged by the omission to give it. Ordinarily, therefore, if the debtor is insolvent when the debt become due, and has ever since remained so, no notice to the guarantor is deemed necessary; nay, not even a demand upon the debtor, when the debt became due.

“This doctrine seems to me fully sustained by the leading authorities beginning with the case of *Warrington v. Furber*, 8 East, R. 242. That case was fully recognized in *Philips v. Astling*, 2 Taunt. R. 206; and the like doctrine was applied in *Holbrow v. Wilkins*, 1 Barn. & Cressw. 10, and *Van Wart v. Wooley*, 3 Id. 439, 447. In this last case Lord Tenterden said, that in cases of guaranty the nature of the transaction and the circumstances of the particular case were to be considered and regarded; and that, where the debtor had become bankrupt, a demand upon him was unnecessary to charge the guarantor. And in *Holbrow v. Wilkins*, and *Van Wart v. Wooley*, the court held, that, as it did not appear, that the guarantor had sustained any damage from the want of a due presentment to the debtor for payment, or of due notice to the guarantor of the default, the guaranty was not discharged. The same doctrine was maintained in *Gibbs v. Cannon*, 9 Serg. & Rawle, 202, and pointedly asserted in the *Oxford Bank v. Hayes*, 8 Pick. R. 423. It was also recognized in the fullest extent in *Reynolds v. Douglass*, 12 Peters, R. 497. And the court in effect there said, that the guarantor is bound, without notice, when the debtor is insolvent at the time, when the debt becomes due; and that his liability continues, unless he can show, that he has sustained some prejudice by the want of notice of a demand on the debtor, and his non-payment; and, if he has sustained any damage, that he will be discharged only to the amount of that damage.

“Now, upon these principles, it seems to me difficult to maintain the position, that the present defendant is not liable on his guaranty. Bruce (the debtor) became insolvent before the bill was drawn, and, for aught that appears, he has remained ever since insolvent. The earliest period, in which it would have been practicable to give notice to the defendant of the arrival of the draft and the acceptance by the plaintiffs, must have been after the 6th of October, 1837; and the earliest



period at which notice could have been given of the default of payment, must have been after the 8th of April, 1838, when the draft was at maturity. It is not shown, nor as far as I know, even pretended in argument, that notice as soon as practicable after either of these periods, would have been of any advantage to the defendant, or that he has sustained any damage by the omission of such notice. The debtor then was, and as far as we know, has ever since been insolvent, and without the means to discharge the debt. If this be so, then upon the general principles already stated, the defendant is not discharged from his guaranty.

"But, it appears to me, that there are circumstances in the present case which show, that the notice was within a reasonable time; and indeed as early, if not earlier, than the case required. It is plain to me (as I have already intimated), that the understanding was, that the teas should be the primary fund or security for the payment of the debt; and until that fund was exhausted by a sale, and the actual deficiency was ascertained, I do not well see how the defendant could be called upon to pay the sum due upon his guaranty. It would be an unliquidated deficiency. In a court of equity, at all events, the defendant would have been entitled to require, that the teas should first be sold and applied to the payment of the debt pro tanto, before he was called upon to pay the amount secured by his guaranty. Now, in point of fact, in or about October, 1838, and before the sale of the teas, he had due notice of the advances and of the probable deficiency. He made no objection to the sale; he did not positively insist upon his being then discharged from the guaranty. The sales were not concluded until the succeeding January, and he had due notice thereof in a short period after the entire deficiency was ascertained. Now, if I am right in this view of the facts, that the guaranty was not to be insisted on, until the other fund was exhausted, and the proceeds of the sales were first to be applied in discharge of the defendant, the demand was made upon the defendant within a reasonable time. It was made as soon as it properly could be. And it is not shown, that an earlier sale, if practicable, would have been desirable, or of any higher benefit to the parties.

"Upon the whole, upon the best consideration which I am able to give this case, the plaintiff is entitled to judgment for the amount of the guaranty, as well upon the special principles of law, as the general circumstances of the case."

It may be inferred from this decision, that when the guaranty is so nearly cotemporaneous with the sale or contract guaranteed, that the whole may be regarded as one transaction, a formal notice of acceptance is not requisite, and it may be inferred in the absence of evidence raising a contrary presumption, that the assent of the creditor was

known to the guarantor; and the rule has been so held in several instances. *Bright v. McKnight*, 1 Speed, 158; *Walker v. Forbes*, 25 Alabama, 139, 147; *Lawton v. Maull*, 9 Richardson, 355; 10 Id. 525; *Paige v. Packer*, 8 Gray, 211; *Cahusac v. Samine*, 29 Alabama, 288. In *Howe v. Nichols*, 22 Maine, 175, the authorities were said to establish, first, that the guarantor must know that the guaranty has been accepted, and next that he should have reasonable notice of the advances made under it, and of the default of the principal. But it was at the same time held, that if the assent of the parties is interchanged, expressly, or by implication, when the guaranty is given, notice of acceptance becomes superfluous, and it will be enough to inform the guarantor within a reasonable time, of the amount of the advances or sales made under the guaranty, and the default of the creditor in not making payment. The question, what should be considered a reasonable time, was admitted to present much difficulty, but was said to depend not so much on the number of months or years as on whether the laches of the creditor were prejudicial to the guarantor. But it seems to have been thought, that delay unexplained would raise a presumption of injury, which could only be rebutted by proof that the situation of the parties was unchanged, and that no loss had actually occurred. Nearly the same ground was taken in *The New Haven County Bank v. Mitchell*, 15 Conn. 206; *Bushnell v. Church*, Id. 406, and *White v. Reed*, Id. 457. In the *New Haven Bank v. Mitchell*, suit was brought on a written engagement, by the defendants, to be answerable for such notes of the firm of Street, Mitchell and Gilbert, as might be discounted by the bank, and evidence was given, that Mitchell, one of the defendants, was a director in the bank, and was well acquainted with all its business operations, that he had himself proposed that the bank should discount bills for Street, Mitchell and Gilbert, and given his guaranty to induce the other directors to assent to this proposition; and that they acted upon the faith of the credit thus given, in making the discounts for which the bank sought to recover. It was held, under these circumstances, that as the question did not arise on a letter of credit addressed to a person at a distance, but between parties who were residents of the same place, the delivery of the guaranty to the plaintiffs, was sufficient to render it binding, without any other evidence or notification of assent, than that involved in their receiving and keeping the instrument without objection. Assent was, however, said to be an essential requisite which must be given expressly when it is not implied.

This case was followed in *Bushnell v. Church*, and again in *White v. Reed*, where the question arose on a letter written by the defendant, in which he promised to be answerable for any debt which his son might contract, not exceeding \$200. The court were of opinion, that although

notice of acceptance was essential to the obligation of this engagement, it need not be averred in the declaration, because it was a necessary element in the contract itself, and was consequently implied in the allegation, that the undertaking had been made. "This," said Hinman, J., in delivering the opinion of the court, "is entirely unlike that class of cases, where, by the terms or nature of the contract, one is bound to pay money, or perform some act, upon request, or upon notice, and such previous request or notice forms a condition precedent, and is therefore, a traversable fact; which must be specially alleged, and may, for the same reason, be specially traversed. In this class of cases, there was, originally, a valid contract, but a contract upon condition; and therefore it is, that the party who seeks performance of it, must show in his pleadings that the condition has been complied with, in order to show that the liability has attached. But, in the case of mercantile guaranties, the object of requiring notice of acceptance, is not for the purpose of performing a condition, upon which a previous contract is to become obligatory; but for the purpose of perfecting the contract itself. It shows that the minds of the parties have met, and that the contract is complete. It is, therefore, unnecessary to allege any other notice of the acceptance of such a guaranty, than what is always necessary in declaring upon any contract. The parties in this case, could not contract until the guaranty was accepted, and notice of acceptance was brought home to the defendant. And it then stood upon the footing of any other contract; and when it is alleged, that the defendant promised, it is of course necessarily implied, that he made a valid promise; in other words, a promise which the plaintiff had accepted, and the defendant had knowledge of such acceptance. If any authority is necessary in support of this doctrine, it is to be found by reference to the established precedents, which are in conformity to the declaration in this case." But while notice was thus held essential to the inception of the contract, it was at the same time decided, that an admission by the guarantor, two or three years after the guaranty was given, that he knew that the debt was due, and ought to be paid, was sufficient to justify the inference that he had received notice of the acceptance of his engagement in due season to bind him to performance.

This decision is sustained by the cases of *Oaks v. Weller*, 13 Vermont, 106, and 16 Id. 63, and *Lowry v. Adams*, 22 Id. 166, and *Noyes v. Nichols*, 2 Williams, 159, where it was not only held that knowledge, however gained, is tantamount to notice, and that information derived from the principal would have the same effect as if it came directly from the creditor, but that the jury might infer that the guarantor, who was a near friend or relative of the principal knew of the credit given to the latter, and could not, therefore, rely on the failure of the plain-

tiff to communicate it as a bar. It follows, and so the court decided, that notice need not be specifically averred, but may be alleged, generally, without certainty either of time or place. These decisions overrule *Rapelye v. Bailey* and *Lawson v. Townes*, where specific averments of notice were held necessary, and are perhaps equally at variance with the dicta in *Douglass v. Reynolds*, and *Edmundston v. Drake*.

The principles laid down by Story, J., in *Wildes v. Savage*, were also followed in *Lawrence v. McCalmont*, 2 Howard, 426; *The Louisville Man. Co. v. Welch*, 10 Id. 461; and *Allen v. Pike*, 3 Cushing, 239, where notice of the acceptance of a guaranty was said to be essential to the mutuality of the contract, and a condition precedent to its obligation as an agreement; while notice of the amount of advances made under it, and of the default of the principal debtor, was treated as a duty of imperfect obligation which the creditor should fulfil if he means to be secure, but which may be delayed or omitted without prejudicing the right of recourse against the guarantor, unless the remedy of the latter against the principal, is lost or frustrated by the want of earlier or fuller information. It was further held in *The Louisville Man. Co. v. Welch*, and *Lawrence v. McCalmont*, that notice of the action of the creditor under the guaranty, and of the default of the principal, will be valid if given within a reasonable time; but while this was treated in these cases, as a question of fact, on which the finding of the jury will be conclusive, unless clearly wrong, in *Allen v. Pike*, a delay of three years in giving notice of acceptance, was said to be clearly unreasonable and a defence to the action in point of law. The final result of the decisions in the Supreme Court of the United States, and in those parts of this country where the rule laid down in *Douglass v. Reynolds* is recognized and followed, would seem to be that the obligation to give notice of the acceptance of the guaranty is imperative, and will defeat the right of action if not fulfilled, unless it can be shown that the assent of the creditor was known to the guarantor, and did not need to be communicated. *Cahusac v. Samine*, 29 Alabama, 282.

This qualification of the doctrine of *Douglass v. Reynolds*, is obviously just, because the law should not insist on what is vain and useless, or require that to be communicated which is a necessary inference from facts already known. It is accordingly well settled that when the parties to a contract of guaranty meet and agree upon the terms, further proof of assent is superfluous, and the contract will be complete without more. *Paige v. Packer*, 8 Gray, 211. Mutual promises on the one part to guaranty an antecedent debt, if the creditor would take a note from the debtor at four months, and on the other to give time were, notwithstanding, held invalid in *Patterson v. Reid*, 7 W. & S. 144, although the note was taken on the faith of the guaranty,

because the creditor was not formally notified of a fact which it was his duty to know. In this instance the parties were friends and neighbors, the guaranty was accepted at the time, and the case could not have been decided adversely to the plaintiff, if the minds of the judges had not been embarrassed by a technical rule foreign to the true doctrine of the common law.

The decisions obviously proceed on different principles, which have not always been distinguished with sufficient clearness. Notice of acceptance seems to have been viewed, in the first instance, as an obligation of good faith and diligence, and an omission to give it did not discharge unless the guarantor was prejudiced. *Seaver v. Bradley*, 6 Greenleaf, 60. It was subsequently treated as an essential ingredient, without which the contract would fail for want of mutuality. *Rapelye v. Bailey*, 3 Conn. 438; *Kay v. Allen*, 9 Barr, 320; *Kellogg v. Stockton*, 4 Casey, 460, 463. In *Kellogg v. Stockton*, Lewis, C. J. said: "that unless the creditor gave credit on the faith of the guarantee, and the guarantor was notified of its acceptance, there was no agreement;" and the same view was taken in the *New Haven Bank v. Mitchell*, 13 Conn. 206, and *White v. Reed*, Id. 457.

It followed that when the assent of the creditor was known to the guarantor, it need not be formally communicated. *Hove v. Nichols*, 22 Maine, 175; *White v. Reed*; *Kellogg v. Stockton* (ante, 91). Such knowledge might be inferred from evidence that the guarantor admitted his liability for the debt, or that he delivered the instrument of guaranty to the creditor, who took and kept it without objection. For a like reason, the declaration need not aver notice of acceptance, because the allegation of a promise implies the assent, without which it would not be binding on the promisor. *White v. Reed*.

These decisions are sustained by others, which establish, that although a promise to be answerable for subsequent advances to a third person, is not binding unless the guarantor knows that the promise has been assented to by the promisee, and is the motive or inducement for crediting the principal, yet that this may be presumed, in the absence of direct proof, from the relations between the latter and the guarantor, and that when these are close and intimate, it may fairly be supposed that the principal did not withhold information which good faith and fair dealing required him to disclose (ante, 91).

A similar view was taken in *Walker v. Forbes*, 25 Alabama, 147, where ——— held the following language in giving judgment: "It is supposed by some of the courts that this notice must be given immediately upon the acceptance of the guaranty; but we think the better opinion, and that more consonant with reason is, that the notice of acceptance shall be given in a reasonable time. But this doctrine is inapplicable to cases where the agreement to accept is cotemporane-

ous with the guaranty, or when it constitutes the consideration and basis thereof. So, if in the case before us the plaintiffs refused to credit Cogburn, and he thereupon agreed to give them as security for his bill to be made with them, the guaranty of Walker, who, in consideration of their promise to accept it, and sell the goods upon the faith of it, executed and delivered it, or caused it to be delivered to the plaintiffs, the parties all being in the same city, and the information as to the amount of groceries sold, and the terms of credit being accessible to all, we do not think any further notice of the acceptance and action upon the guaranty by the plaintiffs, was necessary to charge the guarantor. It was his business to have ascertained the amount and extent of his liability for himself, which he could have done upon inquiry. The whole arrangement having been concluded at the same time, notice of acceptance is implied by the assent of plaintiffs to the guarantor's offer. *Howe v. Nickels*, 22 Maine, 175; *Wildes v. Savage*, 1 Story, 22.

It has also been held on the authority of *Douglass v. Reynolds* (ante, 58), that a promise of payment, or acknowledgment of liability for the debt will be a waiver of a defence founded on the want of notice of acceptance; *Vanleer v. Crawford*, 2 Swan, 115; although this would seem questionable if notice is of the essence of the contract, and necessary to its inception; *The Louisville Manuf. Co. v. Welch*, 10 Howard, 476, 561. But there is no doubt, under the authority of these cases, and that of *Lowry v. Adams* and *Oaks v. Weller*, that such admissions may be evidence that the defendant was either duly notified, or had a contemporaneous knowledge, which supplied the place of notice by rendering it superfluous. *White v. Reid*, 15 Conn. 206.

The deduction from these cases as a whole, would seem to be, that no obligation can arise from acts done by one man on the faith of a promise given by another, unless the assent of the promisee and his intention to act under the promise are known to the promisor, although such knowledge will be as effectual when derived from facts and circumstances as if formal notice had been given and received. Some of the difficulties which have attended the inquiry, unquestionably vanish on attaining this point, because the question ceases to be a branch of the doctrine of notice, and falls within the dominion of the principles which determine when and under what circumstances assent must be communicated, in order to give force and validity to a contract; and it becomes plain, that the numerous instances in which notice of acceptance has been held essential to the obligation of guaranties, imply and depend upon the single proposition that assent cannot give rise to a contract unless each party knows or is informed that the other has agreed, which may be true when the obligation of the contract is meant to be reciprocal and mutual, but not

when the sole object is to induce the performance of an act which is subsequently performed; for if such were the law, there could be no recovery in the common case of a general undertaking, to pay a reward to any one, who shall find or restore a lost or missing article, or bestow his time and labor in some other way indicated by the terms of the undertaking. Under such circumstances, it has never been thought necessary either as a matter of substantial good faith or technical principle, that those who mean to act under the terms of the promise should signify their intention to the person by whom the reward was offered or the promise of payment made. On the contrary, the mere fact of pursuing the course requested by the promisor, and arriving at the result desired by him, has been held sufficient evidence of assent to the terms of the promise; and the measures taken for this purpose need not be communicated until the whole is accomplished and the time arrives for payment; nor, as it would seem, even then, if the nature of the performance is such that it can be ascertained by the promisor without notice, upon making proper inquiry. *Freeman v. Boston*, 5 Metcalf, 46; *Welton v. Dodson*, 3 Carr. & Payne, 162; *Waterbury v. Graham*, 4 Sandford, 215; *The Union Bank v. Coster*, 3 Comstock, 203. This doctrine stands as well upon authority as it does on general principles and the ordinary course of business. Thus, where the promise was, that in consideration that the plaintiff would marry a third person, the defendant would give him ten pounds, it was held, that notice need not be given either of the intention to marry, or of the celebration of the marriage. *Beresford v. Goodrouse*, 1 Rolle, 433. And where the defendant had promised, that if the plaintiff would make a set of sails he would pay for them, notice of the completion of the job was held unnecessary, because the debt became due and was a good cause of action as soon as the sails were completed; *Willis v. Scott*, 1 Strange, 88. The point was decided the same way, in *Lent v. Padelford* (ante, 37), and *Duval v. Trask*, 12 Mass. 154; and again in *Train v. Gold*, 5 Pick. 380, where a promise that a third person would indemnify the plaintiff, if he went on with an execution which had been placed in his hands, was held to bind the promisor on proof that the execution had been levied and returned, without notice of an intention to act under the promise, or anything to show that it had been accepted except the subsequent compliance with its requisitions; although the whole evidence of the contract lay in a letter written by the defendant who resided at a distance, to which no answer was returned by the promisee, so that the case was in all respects similar to a letter of credit or prospective guaranty. "If," said Wilde, J., in delivering the opinion of the court, "A. promise B. to pay him a sum of money, if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B. at the time of the

promise does not engage to do the act. In the intermediate time, the obligation of the contract or promise is suspended; for until the performance of the condition of the promise, there is no consideration and the promise is *nudum pactum*; but on the performance of the condition by the promisee, it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory.

“So, if a reward be offered for the apprehension of a culprit, or for the doing of any other lawful act, the promise, when made, is *nudum pactum*; but when any one, relying upon the promised reward, performs the condition, this is a good consideration for the previous promise, and it thereupon becomes binding on the promisor.” And in *Morse v. Bellows*, 7 N. Hamp. 549, the defendant was held liable on a promise to repay the plaintiff the amount which he should expend in the purchase of certain bonds, although the latter had made the purchase in question without giving notice of his assent to the contract, or of his intention to act in accordance with its terms. It was held in like manner, in *Barnes v. Perrine*, 9 Barb. 202, that a promise in consideration of the future performance of an act specified by the terms of the promise, becomes binding as soon as the act is done, although the promisee may not have bound himself to do it. But it is hardly necessary to cite authorities for a point which results from the tenor of every precedent in assumpsit. When the consideration is performance, and not a promise to perform, the necessity for communicating the assent of the promisee, depends not on what the promisor undertakes to do, but on what he requires in return. If notice form any part of the consideration on which he agrees to be bound, it must be given; if it does not, it will not be requisite. When the foundation of the liability is an act done by one party at the instance of the other, it has always been deemed sufficient to aver performance without alleging notice, or that the plaintiff manifested his assent otherwise than by complying with the request.

Mutual assent is essential to an agreement, which cannot arise unless the minds of the parties unite in a common purpose. A promise is not binding either in law or morals unless it is assented to by the promisee. But it does not follow that he must communicate his concurrence to the promisor. There can be no more unequivocal proof of assent to a request than compliance with it, and when this is given, a right to compensation will arise, although the party did not signify his intention to do what was required. A man who enters into an agreement may prescribe the terms on which he will be bound, and if these are fulfilled he cannot justly ask for more. Whether notice is essential to the obligation of a promise, therefore, depends on the language of the promisor. If his undertaking is on condition or in consideration that the promisee will agree to render the equivalent or do the act required,



the contract will not be binding unless the condition is fulfilled. Thus what is commonly called an offer, is in fact a promise to be bound, if the person to whom it is made will enter into a reciprocal and binding engagement. No obligation will arise unless it is accepted, or in other words, until the engagement for which it stipulates is made. But this is not because an agreement cannot arise from mutual assent, without notice, but because the promise made by one party is conditioned for a mutual promise on the other side. Mutual promises are, therefore, under these circumstances essential to the contract. When however, the promisor merely stipulates for performance, or, in other words where one party agrees to be bound if the other will perform, without requiring him to engage beforehand that he will do so, the latter may withhold his assent until it becomes necessary to act, and then signify it by complying with the terms of the promise, without giving notice of his design. *Young v. Brown*, 3 Sneed. 89, 97. This is nothing more than the well settled principle, that an act done in pursuance of a prior request will give a right to compensation, proportionate to the intrinsic or stipulated value of the service. Under such circumstances, the plaintiff may choose between two different modes of pleading, and may declare on a promise to pay if the defendant will perform, or on a request to perform, followed by an implied promise of payment. These modes of declaring are ordinarily convertible and may be supported by the same evidence; for while a previous request generally implies a promise, a previous promise always operates as a request. *King v. Sears*, 1 C. M. & R. 48; *Lampleigh v. Braithwait*, Hobart, 125; 1 Smith's Leading Cases, 6 Am. ed. 266, 269.

It was, indeed, said, in 1 Williams Saunders, 264, note 1, and held in *De Zeng v. Bailey*, 9 Wend. 233, that a declaration averring that in consideration that the plaintiff would perform the defendant promised to pay, must state the performance to have been on request; but it would seem plain, on principle, and under the authority of *King v. Sears*, that an allegation that the defendant promised to pay if the plaintiff would perform, is good either before or after verdict.

Whichever, therefore, of these modes of declaring is adopted, proof of a promise on one side and of compliance with it on the other, will be sufficient; and no proof or allegation that notice was given of the intention to perform, will be necessary either to give birth to the obligation of the contract, or confer a right of action for the breach. The acts done, or the engagements made on the faith of the promise, may, indeed, be of such a nature as to operate as notice; but this is an incidental result and not of the essence of the contract.

To allege that notice of the intention to act under a guaranty, is necessary to render it binding, is, in fact, to allege that no executory contract can be valid unless founded upon mutual promises, as distin-

guished from a request on one side, followed by performance on the other; because, to make such a notice effectual as a means of information, it must bind the party by whom it is given, and preclude a subsequent change of purpose; or, in other words, have the effect of a promise. See *Kay v. Allen*, 9 Barr, 320, 321. We have seen that a request, followed by performance, will constitute a contract both in pleading and evidence, and an antecedent promise of compensation is an implied request. The law was so held in *Lent v. Padelford* (ante, p. 37), where the objection taken to the declaration for want of mutuality was overruled by the court, on the ground that it was enough to aver performance without alleging that the plaintiff promised to perform. A written promise, said Crompton, J., in *Powers v. Fowler*, 4 Ellis & Bl. 511, "that, if you furnish goods hereafter to A. B., I will see you paid," does not contain anything binding the promisor to furnish the goods to A. B.; but, if he does furnish them, there are cases to show that the guaranty is good." And, he went on afterwards to say, that even when the writing is a mere offer,—that is, a promise on condition of a promise,—there is no reason why "the acceptance of this offer, or, in other words, the reciprocal promise for which the offer is conditioned, should be in writing." In *Oldershaw v. King*, 2 Hurlstone & Norman, 399, 517, a letter promising to be answerable for such advances as might be made to the principal, was accordingly held binding on the guarantor, although containing a provision that the plaintiff should not be bound to advance anything unless he thought proper.

Cases may, undoubtedly be found, with regard to the effect of promises in consideration of forbearance, which might seem at first sight, inconsistent with this doctrine, but they will be found on examination to depend upon the peculiar nature of the consideration on which such promises are founded. It was held, in *Mecorney v. Stanley*, 8 Cushing, 85, that actions brought on contracts in consideration of delay or indulgence given by the promisor, cannot be sustained by proof of a promise on one side followed by performance on the other; nor without mutual promises for payment and forbearance. And the same doctrine was asserted in *Shupe v. Galbraith*, 8 Casey, 10. But this opinion would seem to be at variance with principle, and is not sustained by the authorities cited for its support. Certainty is an essential element in all contracts, and value is equally necessary to the validity of a consideration. Hence, a promise to pay in consideration of forbearance will be void unless it stipulates for some actual delay, and affords the means of determining how long that delay is to continue. See *Semple v. Pink*, 1 Exchequer, 74; *Shupe v. Galbraith*, 8 Casey, 10. The law may, in this as in other cases, put a favorable construction on vague or general

expressions; *Oldershaw v. King*, 2 Hurlstone & Norman, 517, 520; but it cannot add anything to the contract, or supply stipulations which the parties have omitted. Thus a promise to pay a debt, if the person to whom it is due will refrain from enforcing it, may be construed as meaning forbearance for a reasonable time or perpetual forbearance; *Kidwell v. Evans*, 1 Penn. R. 385; *Kean v. McKinsey*, 2 Barr, 30; but a promise to pay, in consideration of forbearance or of a promise to forbear for a short time, is necessarily invalid, because the terms used are insusceptible of construction, and leave it wholly uncertain how long the creditor must defer collecting the debt, before demanding the fulfilment of the promise for its payment, *Lonsdale v. Brown*, 4 W. C. C. R. 148; *The Pittsburgh R. R. Co. v. Banker*, 5 Casey, 160; *Semple v. Pink*, 1 Exchequer, 74; *Oldershaw v. King*, 2 Hurlstone & Norman, 599, 517. And, for the same reason, no recovery can be had on a promise to pay the precedent debt of another, in the form of a note payable on demand, because the terms of the instrument negative rather than imply a request or agreement, that indulgence shall be given for any fixed period, *Crofts v. Beale*, 11 C. B. 172. But this is equally true, whether the assent of the parties be interchanged, in the first instance by mutual promises, or be deduced from an engagement made by one and the subsequent conduct of the other; certainty and value being quite as necessary in the former case as in the latter. The only difference between the two classes of contracts would seem to be, that the connection between mutual promises is ordinarily apparent from their terms, and leaves no room to doubt that each is the consideration for the other; while a promise on one side, followed by action on the other, will not give rise to a contract, unless the promise is made in contemplation of the act, and the act done on the faith of the promise, which is ordinarily a question of fact, and can seldom if ever be presumed by the law. Hence, a promise to pay the debt of another, cannot be rendered binding by proof that it was followed by forbearance, unless there be something to show not only that it was made for the purpose of obtaining time, and that time was actually given, but that the indulgence thus accorded, was in pursuance of the request implied by the promise, *Snyder v. Leibengood*, 4 Barr, 305; *Cobb v. Page*, 5 Harris, 469; *Shupe v. Galbraith*, 8 Casey, 10, which is a question of fact that cannot properly be found affirmatively in the absence of proof. When, however, the language of the parties, or the circumstances of the case, are such as to remove all reasonable doubt that the object of the promisor was to induce the creditor to delay for a reasonable time, or a fixed period, and the evidence shows that he has acted in reliance upon the assurance thus given by delaying as long as its terms require, it would be unjust to refuse to enforce it merely because he did not bind himself by a stipula-

tion which he was not asked to make, and simply did what was required without promising to do it. *Downing v. Funk*, 5 Rawle, 69; *Clarke v. Russell*, 3 Watts, 213. "Though," said Erle, J., in *Oldershaw v. King*, 2 Hurlstone & Norman, 517, 520, "the contract did not bind the creditor to make further advances or to give time, still, it is clear, that if he did make the advances, and did give time, that which was contingent at the time when the instrument was written, became an absolute and binding contract."

These distinctions will appear with greater clearness from the language of C. J. Gibson, in *Clarke v. Russell*, where the question arose, on the right to recover on a promise to compensate the plaintiff, if he would forbear to enforce a security against a third person, in the absence of evidence of assent to the contract, or of any reciprocal promise of forbearance. "It is not essential," said he "that the plaintiff should have *bound* himself to forbear or stay proceedings on the original security, so as to give an action for a breach of promise. Such an agreement would, undoubtedly, be a valid consideration, and might be so laid according to the precedents in cases of mutual promises which are reciprocally the consideration for each other, and which must, therefore, be simultaneous, concurrent, and equally obligatory; but, where the consideration is not promise for promise, less than a positive engagement to do an act which, *when done*, is to be the meritorious cause of the promise, may be a sufficient consideration for it. A positive act is more evincive of the distinction than a negative one. If I promise my neighbor to compensate him if he will do a specific act of service for me, and he does it in consequence, he may maintain an action, though he had not bound himself to do it. The consideration of such a promise belongs to the class called executory, the promise itself being in its nature conditional." These principles were applied in *Weaver v. Wood*, 9 Barr, 220, which establishes that a party who is induced to adopt a particular course of conduct, by an express or implied request and a promise of compensation, may enforce the promise without giving any other evidence of his assent to the contract than by acting under it. Similar decisions were made in the cases of *Lunsdale v. Brown*, 4 W. C. C. R. 148; *Kean v. McKensy*, 2 Barr, 30; *Hakes v. Hatch*, 23 Vermont, 231; *Yard v. Eland*, 1 Lord Raymond, 368; *Butcher v. Stewart*, 9 M. & W. 405; and *Morton v. Burns*, 7 A. & E. 19, where it was held that the plaintiff might recover on a promise of payment in consideration of forbearance, without proving or alleging an acceptance of the contract, or a reciprocal promise to forbear. And, while this proposition carries with it the corollary, that notice is not necessary to give force to a guaranty, in *Morton v. Burn*, Patteson, J., adduced the well-settled rule as to guaranties, in support of the right of the plaintiff to judgment

on a declaration, averring a request to forbear, followed by actual forbearance. "If," said he, "I say that, if you will furnish goods to a third person, I will guaranty the payment, there you are not bound to furnish them; but, if you do furnish them, in pursuance of the contract, you may sue me on the guaranty." And, on reference to the more recent, as well as the earlier precedents of declarations on guaranties of future and executory transactions, it will be found that they do not allege notice of the intention to accept or act under the guaranty, and are limited to a statement of the undertaking of the defendant, and of the performance of the consideration by the plaintiff, with a general averment that the defendant had notice of the premises before action brought. *Johnson v. Nichols*, 1 C. B. 250; *Chapman v. Sutton*, 2 Id. 634; *Boyd v. Moyle*, Id. 643; *Sidwell v. Evans*, 1 Penna. 383.

In *Shupe v. Galbraith*, 8 Casey, 10, and *Mecorney v. Stanley*, 8 Cushing, 85, the court seem to have supposed that contracts in consideration of forbearance, are exceptions to this principle. But the latter case was virtually overruled in *Boyd v. Frieze*, 5 Gray, 553, and the former seems to have arisen from a misapprehension of *Snyder v. Liebengood*, 4 Barr, 405, which simply determines that the question whether the plaintiff forbore of his own motion, or, in consequence of the promise or request of the defendant, is one of fact which should be submitted to the decision of the jury.

Every contracting party, instead of agreeing to pay if the other party will perform, and leaving the latter free to do as he thinks proper, may, however, require that he shall enter into an immediate and reciprocal obligation, and refuse to be bound unless this condition is fulfilled. In common parlance such a promise is an offer, and will not be obligatory, unless the person to whom it is made communicates his acceptance before the offer is withdrawn. Contracts of this sort are well known, and defined in pleading as contracts on mutual promises. Under these circumstances, assent must be given at the time, and a subsequent voluntary performance will not supply the want of the obligation for which the promise stipulates. *Johnson v. Fessler*, 7 Watts, 48; *Berkwith v. Cheever*, 1 Foster, 41; *Beekman v. Hall*, 17 Johnson, 134; *Felton v. Prentiss*, 3 Denio, 312; *Mozly v. Tinkler*, 1 C. M. & R. 602; *Cope v. Albinson*, 8 Exchequer, 184. When, therefore, a guarantor agrees to bind himself on condition that the creditor be also bound, the latter must enter into an immediate and reciprocal engagement, if he means to enforce the contract. *Mozly v. Tinkler*, 1 C. M. & R. 692; *Morton v. Marshall*, 1 Hurlstone & Colton, 305. It does not matter that the creditor goes on to make the advance, or gives the debtor time for payment, because an immediate surrender of the right of choice is demanded by the terms of the contract, *Johnson v. Fessler*. In *McIver v. Richardson*,

1 M. & S. 557, the defendant addressed a letter to the plaintiff, stating that a third person was trustworthy and would pay for what he received, and then went on to say that the writer would have no objection to guarantee the transaction. The advances were made, but the letter was not answered, nor was the defendant informed in any way of what had occurred, until the principal debtor became insolvent.

The court said that the case turned on whether the letter was an absolute guaranty, or merely a proposition tending to a guarantee. The latter seemed to be the preferable construction, and the defendant was not bound by an overture that had not been accepted. The same point was decided in *Mozley v. Tinkler*; and *Felton v. Prentiss*, 3 Denio, 312. In *Mozley v. Tinkler*, the defendant wrote that he had no objection to be answerable to the extent of £50, if his references were satisfactory, and the plaintiffs gave the credit asked for without answering the letter, or informing the defendant in any way that they were satisfied with the references. It was held that the writing was a mere offer, depending on the satisfaction of the plaintiffs, which, being a matter exclusively within their knowledge, ought to have been communicated under the authorities cited in Comyn's Dig., Title Pleader, C. 73 (ante, 63, 65).

Although the principle is clear, there may sometimes be a difficulty in the application. In *Beekman v. Hall*, 17 Johnson, 136; the question was, whether the letter which was relied on to support the action, was a promise to be answerable for the debt of a third person, if the plaintiff would forbear to proceed by execution against the latter, or an offer to be bound, if the terms proposed by the writer were accepted and a promise of forbearance given. The latter view was adopted by the majority of the court, while Mr. Justice Platt took the latter; but it was agreed on all hands, that although an assent to a mere proposal is necessary to bring the minds of the parties together, and constitute a valid contract, yet that where the engagement is absolute, the mere fact that the consideration is executory, will not render it necessary to give notice of the intention to perform. The undertaking, in this case, was compared, by Platt J., to that in a letter of credit, and he held that in neither instance was notice to the guarantor necessary. Had the justice of this comparison been admitted, the rest of the court would have agreed in the conclusion deduced from it, which indeed could hardly have been denied without holding, that in the case already put of the offer of a reward addressed to the public in general, there can be no recovery by a party who has complied with its terms, unless he gave notice that such was his design.

The case of *Payne v. Ives*, 3 D. & R. 664, which has sometimes been regarded in another point of view, was also decided upon the ground, that the writing relied on as the cause of action, was a mere proposal

for a guaranty, which those to whom it was addressed were bound to accept or reject, and which was not binding, unless they communicated their acceptance within a reasonable time, to the person by whom the proposal was made. The defendants had there offered to endorse any bills which might be accepted by a third person, in pursuance of a contract for the purchase of lace into which he had previously entered with the plaintiffs, in consideration that the latter would allow a commission of five per cent. on the amount secured by the endorsement. The lace was delivered under the contract, and a bill at eighteen months for the price, accepted by the purchaser, but no evidence was given to show that the offer had been accepted by the plaintiffs, or was understood by the parties as a binding contract, under which the defendants would have been entitled to proffer an endorsement of the bill, and demand an immediate payment of the commission. When, however, the bill was near maturity, the plaintiffs on learning that the purchaser had become insolvent, presented it for endorsement which the defendants refused. This refusal was obviously just, because the plaintiffs were not entitled to lie by until the circumstances had changed, and then insist on an offer which was not accepted at the proper time. There were two conditions; one, the delivery of the lace, the other a promise to allow five per cent. commissions, and a recovery could not be had without showing that both were fulfilled. The case is not in point where the guarantor agrees to be responsible, without requiring a binding agreement from the creditor.

In *Oxley v. Young*, 2 H. Bl., 613, after some previous correspondence had passed between the parties, the defendants wrote that they were ready to guarantee the payment of certain goods which a third person had ordered from the plaintiffs, and were told in reply that the order in question had been put in hands for delivery. Subsequently the goods were shipped to the purchaser, but no notice of the shipment was given, nor any demand of payment addressed to the defendants until nine months afterwards. In the meantime the latter wrote to inquire whether the order had been executed, and receiving no answer, delivered up certain securities against loss on the guaranty, to the persons from whom they had been received. The delay on the part of the plaintiffs, in giving notice and answering the letter, and the consequent injury by the surrender of the securities, were relied on as a defence to an action brought on the guaranty. The court were, however, of opinion that the contract took effect when the guaranty was accepted, without further notice; and the delay in answering the letter having been explained by the absence of the party to whom it was addressed, in a foreign country, so as to rebut any presumption of fraud, it was decided that the defendants must bear the ill effects of their precipitance in surrendering the

securities. Eyre, C. J., said that if the negligence of the plaintiff was established, it would not be a bar to the action, although it might entitle the defendant to an action on the case for the loss actually inflicted. Such would doubtless have been the language of the common law in many cases where redress is now afforded by recoupment or under the doctrine of equitable estoppel, 2 Smith's Leading Cases, 6 Am. ed., 50, 743.

It may be said, on the whole with much confidence, that the English authorities present no trace of the doctrine which has assumed such formidable proportions in the United States, and on the contrary, establish that if a promise be made by one man to pay if another will perform, a silent performance will give a right to payment. *Powers v. Bumcratz*, 12 Ohio, N. S. 275, 290; *Van Rensselaer v. Aikin*, 41 Barb. 547; *The Wayne Institution v. Smith*, 36 Id. 576. Thus, in *Smith v. Goffe*, 2 Lord Raymond, the plaintiff was held entitled to enforce a promise that if he would deliver up a bond, which he held against a third person, the defendant would pay him for doing so, without averring that he had given notice either of his intention to make the surrender, or that it had been made; and, although the want of the latter averment was made the ground of an unsuccessful motion in arrest of judgment, no one seems to have supposed that any objection could be taken to the absence of the former. The case of *Somersall v. Barneby*, Cro. 287, (ante, 58), goes still further in the same direction, for the promise there was so vaguely worded, as to leave the person to whom it was given free to choose how much he would do, or whether he would do anything, and was yet held to entitle him to a recovery, on the averment and proof of a compliance with the request implied in its terms, without alleging that they were accepted or that he had given notice of their acceptance. Indeed, few things are more obvious, than the inconvenience that would result from a more restricted rule, depriving men of the power of holding out a promise as an inducement to future action, without exacting an immediate and corresponding promise in return. Hence, every system of jurisprudence has recognized the existence of obligations, which acquire their validity from future action, and not from immediate assent. *Powers v. Bumcratz*, 12 Ohio, N. S. 275, 290 (ante, 37). "There is," said Maule, J., in the *Fishmongers Co. v. Robertson*, 5 M. & G. 131, 177, "a large class of cases mentioned by Pothier, where one party, A., promises to do something, if another party, B., will do something also. This contract is not binding on B., but, if he does the act, then it becomes binding on A." The validity of such contracts is treated as unquestionable by Pardessus and Pothier; and the condition on which they depend termed potestative, because it arms the person to whom the promise is made, with the power of determining whether he will act under it, and leaves the other free to retract the engagement



which he has given, at any time before it has been acted upon. If notice is necessary, under these circumstances, it should not be sent until the right of election which the promise accords has been exercised and the contract rendered mutually binding, because, until then, there is nothing to communicate, or at most a mere purpose or design which may be changed at any moment, and if made known can neither be an element in the contract nor serve to guide or enlighten the promisor. In *Offord v. Davies*, 12 C. B. N. S. 748, a promise to be answerable during twelve calendar months, for all such sums of money as the plaintiffs might advance, was held to be countermandable at the pleasure of the guarantor, and a contract revocable on one side obviously cannot be absolute on the other. In giving judgment, Erle, C. J., said, that as such promises were not binding of themselves, and depended for their obligations on the act of the creditor, they were necessarily susceptible of revocation before the condition was fulfilled. It is, therefore, somewhat difficult to understand what is meant by the term acceptance, as applied to contracts which, like a letter of credit look wholly to future and unknown contingencies; and are intended to leave the parties free until the acts on which they are conditioned are performed. A promise to guarantee future advances if the creditor will promise to make them, may be said to be accepted, as soon as the stipulated promise is made; but a promise to be answerable for such advances as shall actually be made, will not become binding or irrevocable, until credit is given or value parted with, on the faith of the guaranty; and hence notice that the creditor has bound himself by a promise which he was not asked to give and has not yet performed, must be wholly immaterial and leave both parties precisely where they were before. And even if a guaranty of a single and specific transaction could be accepted and rendered mutually binding by a promise to give the credit required, this would not be true of letters of credit and general or continuing guaranties designed to meet future and unforeseen contingencies, and induce those to whom they are addressed, to give such aid in money or credit to the principal as he may, from time to time, require, and they think fit to accord, because the parties mean to leave the contract open, until the exigency arises for which they wish to provide, and an immediate acceptance would be premature, and, as it would seem destitute of all real and substantial meaning. The creditor may, indeed, send notice of the advances actually made under a continuing guaranty, but it will not bind him to a further credit, nor can it operate as an acceptance of that portion of the guaranty which still remains open and unexecuted. It is, in fact, plain, that the term acceptance cannot be appropriately used, with reference to a contract, which, like a letter of credit, leaves the extent of the obligation imposed, to the choice or discretion of the person to whom it is addressed. A bill of exchange may

be accepted, because it is certain in time, amount and all other essential particulars, and when once accepted, finally and irrevocably binding. But a guaranty of such credits or advances as the principal may ask and the creditor accord, cannot be the subject of an acceptance, because it does not require that anything shall be promised, and is a mere engagement to be answerable for what is actually done.

The doctrine that acceptance is necessary to the obligation of guaranties, can hardly, therefore, be reconciled with principle, without holding that the obligation which they impose is absolute, not conditional, and that the creditor cannot recover on proof that he has complied, unless he can also show that he promised compliance. A letter of credit may be so framed, as to render a mutual promise essential to the right to enforce it; but this is not the usual wording of such instruments, nor the one best suited to attain their object. A promise to repay if another will agree to lend, differs essentially from a promise to be answerable for such future advances as may actually be made; for while the former binds both parties as soon as the promises are interchanged, the other is essentially revocable and may be recalled at any time before it has been acted upon. It is obvious, that each of these forms of contract is attended with incidents, which are not present in the other; and that no rule of law can be sound, which deprives men of the power of resorting to either, as the exigencies of the occasion or the object in view, may demand. The creditor should not be compelled to bind himself by fetters, which the guarantor has not sought to impose; nor should the guarantor be precluded from refusing to be answerable at any time before advances have been actually made, by the notification of an acceptance which has not been asked. One of the characteristics which distinguishes letters of credit and continuing guaranties, and fits them for the very considerable part which they play in modern commerce, would be lost if the parties were irrevocably bound from the outset, instead of being left free to act, as the needs of the hour and the fluctuations of trade may require. *Oldershaw v. King*, 2 Hurlstone & Norman, 399, 517.

The necessity for notice, to give force and effect to commercial or other guarantees, is accordingly denied by the Supreme Court of New York, and in some of the other States of the Union. In *Douglass v. Howland*, 24 Wend. 35, the suit was brought upon a covenant by the defendant, that one Bingham would well and faithfully perform an agreement which he had entered into with the plaintiff, to account for and pay over all such sums as should be found due from him to the latter. One of the objections taken to a recovery in the action was, that notice had not been given to the defendant, either of the default of Bingham in not accounting, or of the amount for which he would have been liable had he accounted. It does not appear, that in this

instance, notice could with propriety have been held necessary, either under the common law or the decisions on commercial guaranties, already referred to. The event on which the liability of the guarantor depended was not left to the discretion of the plaintiff, and was to be determined by the person on whose behalf the guaranty was given. The undertaking of the guarantor was in fact that the principal should keep his contract, and the right of suit was necessarily complete as soon as the latter made default. In deciding this point, however, Cowen, J., took occasion to review the decisions as to notice by parties acting under commercial guaranties, and showed that they were not in accordance with the principles either of the common or commercial law. And while dissenting from the doctrine, that notice must be given at the time when the guaranty is accepted, he also held that it is unnecessary for the purpose of defining the obligation of the guarantor as a preliminary to the right of suit.

"I am aware," said he, "that there is a class of cases which hold that under a contract guaranteeing a debt yet to be made by another, the guarantor is not liable to a suit without notice that the guaranty has been accepted and acted upon. Indeed, they go farther; if notice of accepting the guaranty be not given within a reasonable time, no debt whatever arises. *Babcock v. Bryant*, 12 Pick. 133. I will only say, that these cases have no foundation in English jurisprudence, where the adjudications are numerous, and clear the other way. *Harris v. Ferrand*, Hardr. 36, 42. In Com. tit. Plead. C. 75, it is said on a promise to pay, on the performance of an act by the promisee to a third person, the promisee need not give any notice; for the promisor takes it on himself to get notice at his peril. And vide as to a guaranty of a debt already due, *Warrington v. Furber*, 8 East, 242; *Swinyard v. Bowes*, 5 Maule & Sel. 62. All the cases requiring mere guarantors to be treated as *endorsers*, rest on *dicta* of two distinguished American judges, in cases of a mixed character, where the defence, it was agreed, would be complete, independent of any such ground. Marshall, Ch. J., in *Russell v. Clarke's Ex'rs*, 7 Cranch, 69, 72; Story, J., in *Cremer v. Higginson*, 1 Mason, 323, 340; *Russell v. Perkins*, Id. 368, 371; and *Rapelye v. Bailey*, 3 Conn. R. 438. The counsel cited no English books; and all the learned court found there, was one case, in which they remark, that Eyre, C. J., *seemed* to have been of opinion that, in guarantees for good behavior, notice of any embezzlement ought to be given in a reasonable time. *Peel v. Tutlock*, 1 Bos. & Pull. 419. The decision was finally rested on the dictum of Chief Justice Marshall, and was very strong in favor of the guarantor. It was on a guaranty to pay for goods deliverable to another, on such terms as the guarantee and the principal should agree on, if the principal did not pay; and though strictly followed by a sale and delivery to the principal,

and a default on his part to pay, yet it was held that no action would lie; at least till notice of the circumstances had been given by the plaintiff to the surety. Other cases hold guarantees of this character to almost the same degree of strictness in giving notice to guarantors, as the law merchant has introduced between endorsees and endorsers. *Green v. Dodge*, 2 Ham. R. 430, 439, 440; *Norton v. Eastman*, 4 Greenl. R. 521. In the latter case, a like principle was imputed to a decision of this court in *Stafford v. Low*, 16 Johns R. 67. The latter, however, merely holds that a declaration made to another of a willingness to become a guarantor, *if required*, would not render the declarant liable as a guarantor, without a compliance with the *express condition*, which means giving notice. In short, that the letter on which the plaintiff based his claim, did not amount to a guaranty. *Ib.* 69, 70. *McIver v. Richardson*, 4 Maule & Selw. 667, was there cited as a case of similar character. *Beekman v. Hale*, 17 Johns. R. 134, puts both of the former cases on that footing, and acts upon them, adding, there must be notice or a subsequent consent to become a guarantee. Such cases are exceptions to the general rule, that notice is not required. They are cases of express condition, like *Birks v. Tippet*, already cited from Saunders. And vide 1 Saund. 33, note (2); Com. Dig. Plead. C. 69. It is proper to say that this place in Comyn's Digest, is cited by Putnam J., in *Babcock v. Bryant*. But the cases cited by Comyn are like those in the note 1 Saund. 33, where the request or notice is expressly required. "There," says Sergeant Williams, "the request is parcel of the contract." All the cases cited by him are of collateral matters, to be done on request, by the very words of the contract; and even these cases do not extend to a proper debt or duty of the party promising. There, though he by words, make the request or notice a condition, yet the bringing of the action is a sufficient notice, and such is the very first case cited in the note. Yelv. 66. Vide Com. Dig. Plead. C. 70.

"I forbear to search farther for the English law, after the admission implied by *Douglass v. Reynolds*, 7 Peters, 113, 125. The question was there examined by Mr. Justice Story. The only English cases cited by him, are *Oxley v. Young*, 2 H. Black, 613, and *Peel v. Tallock*, the latter being also noticed, as mentioned before, by the Supreme Court of Connecticut. In *Oxley v. Young*, the surety was holden liable; and I do not find any countenance given to the idea that notice was necessary by way of condition. The defendant ordered goods for another, and guaranteed that he should pay for them. They were accordingly shipped to him by the plaintiff, the guarantee. It is true that notice of the shipment was given to the defendant; and he sought to raise a defence, on the subsequent neglect of the vendor. Eyre, C. J., said the right to sue on the guaranty attached, when the order was

put in a train for execution, subject to its being actually executed ; and the right could not be divested, even by the wilful neglect of the vendor. As to *Peel v. Tatlock*, it has been impossible for me to perceive that even an intimation was intended of notice being essential. The difficulty felt by Eyre, C. J., seems to have been, whether the creditor had not defrauded the guarantor by industrious concealment. I may then, I think, repeat with great confidence, that all the cases requiring notice are American, and depart from the rule of the common law. *Douglass v. Reynolds* may be sustained by the dictum of C. J. Marshall ; and indeed by *Edmundston v. Drake*, 5 Pet., 624, where the court, with that learned chief justice at its head, carried the dictum into a *direct adjudication*. No English case is claimed by Mr. Justice Story, in any of his decisions, as sustaining the doctrine in the least. C. J. Marshall does not even cite one, in his opinions.

“ The short answer which the English cases, decided long before our revolution, furnish, is, that the guarantor, by inquiring of his principal, with whom he is presumed to be on intimate terms, may inform himself perfectly, whether the guaranty were accepted, the conditions fulfilled, and payment made. Where that can be done, the cases all hold that notice is not necessary, even as preliminary to the bringing of an action, much less to found a right of action. The only exception is the well-known one of collateral parties to bills of exchange or promissory notes. Vide *Phillips v. Astling*, 2 Taunt. 206.”

This view was sustained in *Whitney v. Groat*, 24 Wend. 82, and *Smith v. Dann*, 6 Hill, 543. In the latter case the guaranty was for a limited amount, and of a sale to be effected on a specified credit, while in the former it amounted to a broad undertaking to be answerable for all that might be sold to the party, in whose behalf the guaranty was given. The court held in both instances that as there was nothing on the face of the guaranty which required notice, it could not be required ; and that the contract became complete and the liability of the guarantor under it absolute, as soon as the goods were delivered to the principal. These decisions were followed in the *Union Bank v. Coster*, 3 Comstock, 203 ; and *The Bank of Louisiana v. Coster*, 1 Sanford, 563, and notice of the intention to act under a general letter of credit held unnecessary to bind the party by whom it was given.

In *Caton v. Shaw*, 2 Har. & Gill. 13, the defendant addressed a letter to the plaintiff in these terms : “ Mr. A. Fenn tells me that he is about to loan from you five hundred dollars, and wishes me to state that I will become his eventual security for the payment ; this I am willing to do, as I have found him punctual on similar occasions.” The opinion of the court was delivered by Archer, J., who held the following language : “ It is said that notice of acceptance, and notice of the extent of the advances made by the plaintiffs, should have been given to the defend-

ant; and this objection is grounded on the idea that this is a mere overture, or offer to guarantee. If it is to be considered as a guaranty, there is an end of the objection. The substance of the letter is this: 'I will become his eventual security for payment.' Here is, then, no conditional engagement, but a conclusive undertaking. In *McIver v. Richardson*, the court considered the paper there offered as a proposition only leading to a guaranty. The words do not here import that if application were made to him he would guarantee; it required no intimation that it was regarded as a guaranty, for it spoke so intelligible a language that it could not be mistaken; and it is shown by the evidence that it conveyed to the plaintiff the idea intended, which was, that he would be security for money loaned to the amount mentioned in the letter." It was, consequently held that the plaintiff was entitled to enforce the guaranty, although he had not notified the defendant of his intention to accept or act under it, and had limited the advances to an amount considerably less than that specified by its terms. Similar decisions were made in *White v. Stacker*, 1 Sneed, 169, and *Bright v. McKnight*, Id. 158, where the opposite doctrine was said to encumber a useful class of instruments, with subtle and embarrassing distinctions, and to be at variance with principle. The necessity for notice of acceptance was also denied in the *Farmers' and Mechanics' Bank v. Kerchival*, 2 Michigan, 504; while it was treated as doubtful in *Thrasher v. Ely*, 2 Smedes & Marshall, 141, and *Williams v. Stanton*, 5 Id. 347; and again in *Wadsworth v. Allen*, 8 Grattan, 504; and *Moore v. Holt*, 10 Id. 284, 296.

The tendency of the more recent decisions is in the same direction, and towards discarding the rule, or limiting it by restrictions. A guarantor who agrees to be primarily answerable, and not merely in case the principal makes default, need not be informed of the intention to accept under the guarantee, as the law is held in Alabama; *Scott v. Wyeth*, 34 Ala. 89; *Jolly v. Walker*, 26 Id. 90: and in *Scott v. Wyeth*, a letter promising to be good for any merchandise that might be sold to the bearer, was said to be within this distinction. In *Powers v. Bumcratz*, 10 Ohio N. S. 272, a sealed instrument reciting that B., a resident of Perry county, Ohio, was desirous of buying goods of C., a merchant of Philadelphia, and promising to be responsible for any purchases he might make to an amount not exceeding twelve hundred dollars, was held to be binding without notice of its acceptance by C., or of the sales made under it to B., and the court gave their unqualified adhesion to the case of *Douglass v. Howland*, as containing the rule of the common and commercial law. It was said in like manner in *Yancy v. Brown*, 3 Sneed, 89, that a request followed by performance was a contract under the common law as applied in Tennessee. A letter requesting the plaintiff to sell goods to a third person, and promising

to be answerable for every dollar's worth the latter might buy, was accordingly held to make the writer responsible without notice of acceptance, or notice of the amount actually sold, because, although the contract remained open and uncertain until the sale was made, the guarantor might well obtain the necessary information from the principal. And the cases of *Gray v. Parker*, 8 Gray, 211; *Hatch v. Cobb*, 12 Id. 447, and *Maynard v. Morse*, 36 Vermont 617, would seem to indicate that the courts of Vermont and Massachusetts now concur with those of New York in holding that when the promise of the guarantor is absolute and not a mere overture or proposition, notice is not essential to the validity of the contract.

The true rule on a question which has been needlessly complicated, was stated and followed in *Jackson v. Yendes*, 7 Blackford, 526, where it was held that a proposition for a guaranty, must, like every other offer be accepted; but, that an absolute promise to pay for such advances as another shall make needs no acceptance, and will be binding on proof that the advances were made in pursuance of the promise. The same principle was laid down in *Powers v. Bumcratz*, 12 Ohio, N. S. 273, 286; *Paige v. Rainer*, 8 Gray, 211; *Williams v. Collins*, 2 Law Repository, 580, and *Shewell v. Knox*, 1 Devereux, 404; although the majority of the court would seem to have held, in *Shewell v. Knox*, that a general letter of credit addressed to all who may choose to act upon it, must necessarily be construed as a mere offer or proposition, and consequently will not be valid without acceptance.

A letter of credit may, however, be so worded as to render diligence in giving notice essential to the right of recovery. For when the request is expressly or by implication, that a loan shall be made or goods supplied on the credit of the person who writes the letter, and not of him for whose benefit it is made, the case ceases to be one of guarantee or suretyship, and becomes subject to the rule that a mandatory or agent must communicate all necessary information to the principal; and a failure to perform this duty may operate as a bar by shifting the burden of proof, and rendering it incumbent on the person who makes the advance to show that his neglect was not prejudicial to the party on whose authority it was made. If A. requests B. to advance money to C., and charge the amount to him, C. is indebted to A., and A. to B., but there is no debt as between B. and C., and A. is therefore liable directly, and not as a guarantor. The distinction is clearly stated in the following passage from Mr. Bell's Commentaries on the law of Scotland.

"Letters of credit, strictly speaking, are mandates, giving authority to the person addressed, to pay money, or furnish goods on the credit of the writer. They are generally made use of for facilitating the supply of money or goods required by one going to a distance or abroad,

and avoiding the risk and trouble of carrying specie, or buying bills to a greater amount than may be required. The debt which arises on such a letter, in its simplest form, when complied with, is between the mandatory and mandant, though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. 1st. Where the letter is purchased with money by the person wishing for the foreign credit, or is granted in consequence of a check on his cash account, or procured on the credit of securities lodged with the person who grants it, or in payment of money due by him to the payee, the letter is in its effects similar to a bill of exchange, drawn on the foreign merchant; the payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter, but raises no debt to the person who pays on the letter, against him to whom the money is paid. 2d. Where not so purchased, but truly an accommodation, and meant to raise a debt against the person accommodated, the engagement generally is to see paid any advances made to him, or to guarantee any draft accepted, or bill discounted, and the compliance with the mandate, in such case, raises a debt, both against the writer of the letter, and against the person accredited."

The subject has been embarrassed by considerations drawn from systems which differ materially from our own. The civil law agrees with the moral or natural law, in basing the obligation of contracts on the expectation created in the minds of those with whom they are made, and consequently requires that this should be made known to the promisor, unless he has waived or dispensed with such a communication. The engagement made by one party and the assent of the other, constitute the contract and give it legal, as well as moral efficacy. Pardessus, *Droit Commercial*, Part 2, tit. 1, chap. 1, sec. 1, 141, 143; Pothier, part 1, chap. 1, art. 1, §§ 1, 2. The only exception to this rule is, where the nature of the promise or the circumstances under which it is made, render assent useless or superfluous, as when a promise is made for the purpose of inducing future resolve or action, and without any view to an immediate response or determination; Pothier, Part 1, § 2, art. 1. Thus a promise to pay another a sum of money if he will cut down a tree, will be binding as soon as the tree is felled, without the aid of a promise to fell it or any other proof or expression of assent, than the performance of the act for which the promise is conditioned. Here what is asked is not assent but compliance; the promisee is not required to bind himself by an obligation and might refuse to do so if he were; and cannot assent until the time comes for action otherwise than by saying that he will take the matter into consideration, which, if said, would be simply immaterial and have no legal force or signification. We may consequently believe that where



such promises are in question, which are ranged, by Pothier, under a separate head, as "obligations conditionnelles potestatives," the civil law agrees with the law of England, and holds the contract perfected by the performance of the condition. But, aside from this exception, acceptance is essential to the obligation, which is complete as soon as the promise is accepted and derives no additional force from the acts or stipulations of the promisee. No consideration is necessary to constitute an agreement, although it may be defeated by a failure of the cause on or by which it is induced or founded, or by an error or mistake affecting the identity of the subject matter, and which prevents the minds of the parties from meeting on the same object. On the other hand, all engagements however solemnly or formally made or accepted, are referred by the common law to the forum of conscience, unless they are sustained by a sufficient consideration to bring them within the scope of a system which refuses compensation where there has been no actual loss, and makes the validity of promises depend, not on the assent of the promisee, but on whether he has parted with value, or incurred an obligation at the instance of the other and on the faith of the inducement held out by him. 1 Smith, Lea. Cases, 266; *Rann v. Hughes*, 7 Term, 350. The consent or concurrence of the parties in a common purpose is essential; mere assent not equally so; and the material question is, whether the terms or conditions of the promise have been fulfilled, and are sufficient to render it legally binding. Hence, that which the civil law makes the exception, here becomes the rule; every promise is conditional, and derives its validity from the fulfilment of the condition, either at the time, or at a subsequent period. The promise may be what is commonly called an offer, that is an engagement, to be bound if the other party will be bound also, or it may be in the form of a positive engagement to be bound absolutely upon and in case of performance, without exacting a reciprocal promise to perform. In either case, it is substantially the same, and depends for its force on the acts or stipulations of the promisee.

The distinction between those promises which are generally known as offers, and those which are commonly viewed as absolute, is consequently nominal rather than real; the only difference being that the latter undertake for performance if the promisee will perform, while the former require a mutual promise. Every parol contract will be found on examination to consist either of two conditional propositions or offers, which together constitute an unconditional agreement, or in a conditional promise, which has become absolute by the performance of the condition. Thus, a contract of sale grows out of an offer to buy, if the vendor will sell, and an offer to sell, if the vendee will buy; the condition on one side being payment or a promise to pay, and on the other a transfer of the right of property or a promise to transfer it,

each of these engagements satisfying the requisitions of the other, and both together forming an absolute agreement. See *Corson v. Mulvany*, 13 Wright, 88, 89. And on recurring to the classification adopted by the earlier pleaders, by whom declarations in assumpsit were reduced to form and method, we shall find express contracts arranged under the two heads of promises in consideration of promises, and promises in consideration of acts, the one stipulating for performance, the other for an engagement to perform, but both conditional and depending for validity on the fulfilment of the condition. The action of assumpsit is, in fact, the earliest application of the wise and salutary principle, which, under the name of equitable estoppel binds men, not by what they say or declare, but by what others do or promise on the faith of their declarations; and hence the right of suit devolved at common law, not on him to whom the promise was made, but on him who acted on the faith of the promise. *Edmundston v. Penny*, 1 Barr, 394; *Crow v. Rogers*, 1 Strange, 592; *Rice v. Ashley*, 32 Conn. 297, 304; *Stewart v. The Trustees of Hamilton College*, 1 Denio, 403; *Warren v. Blatchelder*, 15 N. Hamp. 127; Notes to *Depeau v. Waddington* (post). Accordingly, while the precedents which embody the science of pleading are precise in stating the request of one party and the fulfilment of it by the other, they contain nothing to indicate that the assent of the promisee must be made known or communicated to the promisor otherwise than by doing what he required. Pleading has always been regarded as the best test and criterion of legal principles, and that which need not be set forth in declaring is seldom requisite in proof.

It is therefore obvious, that the civil and common law differ in some important particulars, which must be kept in view in reasoning from one to the other. Mutual assent, is the one and all-sufficient requisite under the civil law, which will of itself convert a promise into a contract; while engagements derive their force at common law, not from the assent or acceptance of those with whom they are made, but from the injustice of allowing those who make them to violate stipulations on which others have relied; and hence no promise can be valid, unless it induces some act or forbearance, or some engagement to do or forbear, which must, moreover be an exact fulfilment of the terms or conditions prescribed by the promisor. The former system holds every promise binding, which has been expressly or impliedly accepted by the promisee, but the latter requires first a promise, next that something shall be required in return by the promisor, and finally, fulfilment or compliance on the part of the promisee. And while a condition is a mere accident under the civil law, which may defeat the contract if broken, but gives no additional force when performed, it is essentially necessary under the common law as the

connecting link between the engagement of the promisor and the acts or stipulations of the promisee, without which, the one could not serve as consideration for the support of the other. Hence, while conditional promises form but one subdivision in the civil law, they are the only engagements known to the common law, under which every promise unaccompanied with a condition must necessarily be destitute of a consideration, and invalid, unless sustained by a seal.

Accordingly, a contract which is required by statute to be in writing, must necessarily fail, unless the instrument discloses some condition on the performance of which the promisor agrees to be answerable; *Wain v. Wallers*, 5 East, 10; 1st Smith's Leading Cases, 460; 6 Am. edition. On the other hand, if this appears in the written note or memorandum, it need not show that the promise was accepted, which may be proved if requisite by extrinsic evidence. *Stadt v. Lisle*, 9 East, 348; *Moore v. Campbell*, 10 Exchequer, 323; *Powers v. Ellis*, 5 Ellis & Bl. 511. These authorities establish, first, that an absolute promise is void at common law, and, next, that assent is not essential to the obligation of the contract, except in so far as it is necessarily implied in the fulfilment of the terms or conditions prescribed by the promisor. When no such condition exists, or where it does not appear with certainty the contract is invalid, and will not be rendered binding by the assent or acceptance of the promisee, or even by proof that he did something which may, but is not shown to have been, what the promisor desired. *Semple v. Peek*, 1 Excheq. 74; *Oldershaw v. King*, 2 Hurlstone & Norman, 399, 406, 517; *Crofts v. Beale*, 11 C. B. 172; *Mecorney v. Stanley*, 8 Cushing, 85. For as the binding force of an agreement is derived, not so much from the engagement made on one side, as from the equivalent to be given on the other, this must appear with as much clearness as the promise. It will not be enough that the plaintiff did or refrained from doing some act in consequence of the undertaking of the defendant, unless his act was at the special instance and request of the defendant, and the very thing for which the latter stipulated. *Johnson v. Deas*, 4 Johnson, 84; *Elsie v. Gatewood*, 5 Term, 143.

Promissory notes and bills of exchange are, seemingly, an exception to these principles, because a consideration will be presumed until the contrary is proved; but it is well settled, that if this presumption is rebutted, the contract will be invalid, and the distinction is consequently one of evidence and not of principle. *Swain v. Eutling*, 8 Casey, 486; *Pearson v. Pearson*, 8 Johnson, 26; *Ten Eyck v. Van Horn*, Id. 120; *Thunder v. Cox*, 18 Id. 145; *Copp v. Sawyer*, 10 N. Hamp. 477; *Fletcher v. Dinsmore*, 4 Mass. 392; *Parrish v. Stone*, 14 Pick. 198; *Phelps v. Power*, 23 N. Y. 69.

The rule that notice must be given of the advances under a continu-

ing guarantee (ante, 47), was said in *Wildes v. Savage*, 1 Story, 22 (ante, 68), to be inapplicable where the credit is defined beforehand by the guarantor. The reason given for this decision, that if information was desired it might be obtained from the principal, would be equally good for laying the rule aside; and the law was so held in *Lowe v. Beckwith*, 14 B. Monroe, 184, 190, where the court deferred to the authority of *Douglass v. Reynolds*, by requiring notice of acceptance; but said that when the obligation of the contract is completed by mutual assent, the guarantor must ascertain the nature and extent of the advances under it at his peril. And a similar view was taken in *Douglass v. Howland*; *The Union Bank v. Coster*, 3 Comstock, 203; *Noyes v. Nichols*, 28 Vt. 160; *Powers v. Bumcratz*, 12 Ohio, N. S.; and *Cahusack v. Samini*, 29 Ala. 288.

All the cases agree that it is sufficient to give notice of the advances made under a guarantee, within a reasonable time, which must be left as a question of fact to the jury, under the instructions of the court. *Louisville Manufacturing Company v. Welsh*, 10 Howard, 461; *Lowe v. Beckwith*; although a long and unexplained delay is presumably unreasonable, and *prima facie* sufficient to discharge the guarantor. The weight of authority, however, seems to be that proof that the principal was insolvent when the advances were made, or became so immediately afterwards, will excuse the want of notice, by showing that it was not injurious to the guarantor. *The Louisville Manufacturing Company v. Welsh*; *Massey v. Rayner*, 22 Pick. 223; *Vinal v. Richardson*, 13 Allen, 521, 526. If, however, notice is requisite to give certainty to the contract, it is an indispensable prerequisite and must be given before action brought; and the point was so held in *Babcock v. Bryant*, 12 Pick. 133; and *Vinal v. Richardson*.

We have seen that according to *Douglass v. Reynolds*, the creditor must not only give notice that he accepts the guarantee, and of the advances made under it to the principal, but demand payment from the latter when the debt matures, and inform the guarantor that it is not paid (ante, 48); *Verder v. Ellsworth*, 15 Ind. 134; *Spence v. Carter*, 4 Jones, 287. This was said to be an essential requisite whenever one man made himself answerable for the contract of another. It is, however, like the whole doctrine of *Douglass v. Reynolds*, at variance with the rule of the common law as established in England, and the best considered decisions in the United States. *Walton v. Mascall*, 13 M. & W. 52; *Douglass v. Howland*, 24 Wend. 55; *Vinal v. Richardson*, 13 Allen, 526. The principle is so obvious, that it should never have made a subject for doubt. If a man undertakes that another shall do an act of any kind, as for instance, that he will pay a sum certain, or go to Rome, the promise is broken if the act be not performed. This is equally true, whether the third person is or is not under a collateral

obligation. If A. agrees that B. shall keep his agreement, a failure of performance on the part of B. is *ipso facto*, a breach on the part of A., and any proof which would sustain an action against the former, will be equally good against the latter. *Walton v. Mascall*; *Vinal v. Richardson*. When, therefore, a demand is not requisite to charge the principal, it cannot be requisite as it regards the guarantor. The error seems to have arisen from regarding a promise that another shall pay what he owes, as less absolute than a promise to pay it for him. The liability is contingent in both cases on the non-payment of the debt, but there is nothing contingent in the obligation, which is in the latter case to make the payment, and in the former, to see that it is made.

The doctrine that notice of the default of the principal must be given before proceeding against the guarantor, seems to be equally untenable. It is no doubt true that the liability imposed by a guaranty depends on a contingency which must be known to the creditor, and may be unknown to the guarantor. But it is equally true that the latter should follow up the principal, and see that the engagement made on his behalf is fulfilled; and there is no obligation to give notice of that which the party can ascertain for himself (ante, 37). Although the liability of the defendant in *Douglass v. Reynolds* did not arise, until the party primarily answerable made default; yet that event was not exclusively within the knowledge of the plaintiffs or defendant on their choice; on the contrary, it depended on the action of a third person, and was one of those contingencies which every man who enters into an engagement must notice for himself. The argument on this head becomes stronger if we reflect that the creditor is, agreeably to the decision of the court, bound to acquaint the guarantor with the amount advanced and the time when it was to be repaid, because when this is done, all uncertainty is removed, and it becomes the duty of the guarantor to pay at the day if the principal does not. If this obligation is not fulfilled the breach is complete, and the party injured by it should not be required to go through the form of making a demand and giving notice.

It is well established that a man who undertakes for performance by another, is as much bound to exact diligence as if the obligation was primarily his own, and must see that the act is done. The question arose in *Mounsey v. Drake*, 10 Johnson, 27, on a bond conditioned that one Tuttle should surrender himself to the sheriff on a day certain. The court held that it was for the defendants to prove that the condition was fulfilled, and that they could not escape from liability by showing that Tuttle had done all that he could to perform the contract, and that the neglect lay with the sheriff. "The condition of the bond, required the performance of an act not to be mistaken or misunderstood, and the defendants were bound, at their peril, to see that the sheriff took or received Tuttle into custody, as a prisoner in

the suit. The plaintiff was not to do any act to facilitate the surrender. No precedent act was required on his part, and it was no excuse for the non-performance of the condition, that the plaintiff might, and did not, issue an execution to the sheriff, or that the sheriff might and did not or would not, take or receive Tuttle into custody. It is not sufficient for the defendants to show that Tuttle had even done all in his power. A performance must be shown, unless prevented by the act of God, or by the law of the land, or by the act of the obligee himself. Lord Coke says, that if A. undertake to enfeoff B., he is bound to prevail on B. to accept livery of seisin. So if A. covenant that B. shall resign his living at a particular time, the covenant is forfeited, though the bishop will not accept the resignation. Thus, in the case of *Hesketh v. Gray*, Sayer, 185, the condition of the bond was, that the obligor should deliver up a vicarage into the hands of the proper ordinary, and it was held to be no excuse for the non-performance of the condition, that the obligor had offered to resign and deliver up the vicarage, and that the bishop had refused to accept the resignation. The bishop was a stranger to the obligee, and, therefore, as Sir Dudley Ryder observed, it was incumbent upon the obligor to procure his acceptance; for if an obligor undertake, for the act of a third person, who is a stranger to the obligee, it is incumbent upon the obligor to procure the act to be done, unless at the time of entering into the bond there was an impossibility of doing the act, or the doing of it has since become impossible by the act of God, or of the law."

The principle is the same where the party for whom the defendant binds himself is also bound. In *Allen v. Rightmere*, 20 Johnson, 365, the suit was brought on a guaranty of a promissory note, and it was alleged that the plaintiff should have made a demand and given notice before proceeding against the guarantor.

But this objection was overruled by Spencer, Chief Justice, who said that "Proof of demand, and notice of non-payment, were not necessary. The defendant's engagement is, in effect, that Toan should pay the note, or that he would pay it. It is the duty of the debtor to seek the creditor, and pay his debt on the very day it becomes due. As regards the maker of the note, and to render him liable, no demand is necessary. A demand of payment is necessary only to fix an endorser or a surety, whose undertaking is conditional. An endorser does not absolutely engage to pay. It is a conditional undertaking to pay, if the maker of the note does not, upon being required to do so where the note falls due, and upon the further condition, that the endorser shall be notified of such default. The defendant insists that he stands in the situation of an endorser merely; but, such is not the fact. The undertaking here is not conditional; it is absolute that the

maker shall pay the note when due, or that the defendant will himself pay it."

This decision was followed in *Douglass v. Howland*, 24 Wend. 55, where the instrument was under seal, and again in *The Union Bank v. Coster*, 3 Comstock, 203, in a case arising on a simple contract. It is also sustained by the cases of *Hammond v. Gilmore's Adm'rs*, 14 Conn. 479, (ante, 61); *Bushnell v. Church*, 15 Id. 406, 590, and *Woolley v. Sergeant*, 3 Halstead, 362, and notice said to be only requisite where the instrument guarantied is negotiable, and exact diligence enforced by the commercial law (post, 124). A similar decision was made in *The Bank v. Hammond*, 1 Richardson, 281, where a guaranty of a bond was held to import a positive engagement to pay it if the obligor did not, and to render the guarantor liable as soon as the condition of the bond was broken, without a demand on the obligor, or notice of his default. And the numerous instances, in which demand and notice have been held unnecessary, under guaranties of bills of exchange and promissory notes (post) apply, *a fortiori*, where negotiable instruments are not in question, and where there is less occasion for the punctuality, which is one of the characteristics of the mercantile law. The difference which has been supposed to exist between prospective guaranties, and guaranties of existing obligations, (*The Louisville Man. Co. v. Welch*, 10 Howard, 461,) ceases when the latter have been reduced to certainty by notice of acceptance and of the nature and extent of the advances made under them, and, therefore, cannot serve to reconcile the case of *Allen v. Rightmere* with that of *Douglass v. Reynolds*. Nor is it practicable to distinguish between commercial transactions, and those of common life, and dispense with notice in the one while requiring it in the other. The law was so held in the *Union Bank v. Coster*, with reference to a letter of credit, and again in *Train v. Jones*, 11 Vermont, 444, where the question arose on the following instrument: "Messrs. Train & Co.:—If Mr. Augustus Jones shall make a contract for four or five hundred dollars' worth of hides, I will stand responsible for any contract said Augustus Jones, or his agent, shall make." The opinion of the court was delivered by Redfield, J., who held the following language: "From all the cases, this rule is, we think, fairly deducible. An absolute guaranty, that the debt of a third person shall be paid, or that he shall pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated, and the creditor is not bound to use diligence, or to give notice of non-payment. But where the guaranty is, that the creditor himself shall be able to collect the debt of some third person, there it is incumbent upon the creditor to use due diligence, and to give reasonable notice of non-payment. *Foster v. Barney*, 3 Ver. R. 60; *Russell v. Buck*, 11 Id. 166. This is in accordance with the long

established rule of the common law. If I undertake for the act of a third person, I am not entitled to notice of his default before suit brought. But if I undertake directly for your act or success, I am entitled to notice of your failure; for this is a fact peculiarly within your knowledge. This point is virtually decided in *Knapp v. Parker*, 6 Vermont, R. 642." This view is sustained by the English authorities, and the best considered decisions in the United States. *Smith v. Ide*, 3 Vermont, 296; *Duval v. Trask*, 12 Mass. 194; *Peck v. Barney*, 13 Vermont, 93; *Noyes v. Nichols*, 2 Williams, 159.

It results from these authorities, which accord with the uniform course of decision in England, that when a demand is not requisite to complete the breach as it regards the principal, it will be equally unnecessary, as against every one who having promised absolutely that the contract shall be fulfilled, is in default if the appointed time goes by without performance. *Walton v. Mascall*, 13 M. & W. 452; *Vinal v. Richardson*, 3 Allen, 32. If, said Wells, J., in *Vinal v. Richardson*, the guarantee, be for the specific performance of an act by another, and be absolute in terms, whatever is sufficient to show default in that other, will ordinarily show a breach of the contract of guaranty.

The principle is the same when the guarantor agrees to pay if the principal does not, because the obligation accrues as soon as the debtor makes default, and may be enforced at once by suit. For although such a contract is, as indeed every guarantee must be, collateral; it becomes absolute when the contingency occurs, and notice need not be given because the event is one which the guarantor may ascertain from the person for whom he agrees to be answerable. *Grant v. Hotchkiss*, 26 Barb, 63; *Young v. Brown*, 3 Sneed, 86. It was said accordingly, in *Grant v. Hotchkiss*, that a promise that another shall fulfil an engagement which he has made, is not less absolute for being collateral to the contract of the principal, and may be enforced without a demand on him, or notice to the guarantor, although the rule may be different where the guarantee is to indemnify the creditor against loss, or that the assets of the principal shall be adequate to pay the debt.

The law was so held in *Lowe v. Beckwith*, 14 B. Monroe, 184, and demand and notice said to form no part of the duty of the creditor, even when the question arises on a commercial guarantee or letter of credit. And this would now seem to be the well settled doctrine in New Hampshire, Vermont, Connecticut, New Jersey, South Carolina, Alabama and Mississippi, whenever the guarantee is so worded as to bind the guarantor to or for the performance of an act at a day certain, although agreements properly within this rule are not unfrequently taken out of it by construing them as being not that the contract



shall be performed according to its terms, but to indemnify the creditor, if the principal makes default. *McDougal v. Calef*, 34, N. Hamp. 573; *Beebe v. Dudley*, 6 Foster, 49; *Donley v. Camp*, 22 Ala. 659; *Thrasher v. Ely*, 3 Smedes & Marshall, 139; *Redfield v. Haight*, 27 Conn. 31; *Bashford v. Shaw*, 4 Ohio, N. S., 268; *Noyes v. Nichols*, 2 Williams, 159.

The rule originally laid down in *Douglass v. Reynolds* (ante, 48), was qualified, if not abandoned when the case was again brought before the court, and demand and notice said to be duties of imperfect obligation, which might be omitted when their fulfilment could lead to no good result. A failure in either respect would not discharge the guarantor, unless it was shown to be injurious, and then only to the extent of the damage sustained. A demand upon any insolvent was a useless ceremony, which the law would not enforce. *Warrington v. Furber*, 8 East, 242, 245. The court below had, therefore, erred in refusing to instruct the jury that if the principal was insolvent when the debt matured, it was not necessary to make a demand upon him and acquaint the guarantor with his default (ante, 56).

This opinion is in marked contrast with the former judgment of the court. Demand and notice were there held to be conditions precedent without which there could be no right of suit. It was said that by the very terms of the guarantee, as well as by the general principles of law, guarantors were only collaterally liable, upon the failure of the principal to pay the debt. A demand upon him and a default upon his part were indispensable to constitute a *casus fœderis*. This conclusion would be undeniable if it were true that a man who makes an engagement may lie by until he is summoned to fulfil it. But this cannot be conceded either as a general proposition, or in the connection in which it was applied. A debtor is bound to seek out and pay his creditor, whether the debt is payable generally or at a day certain. And as a demand is not necessary to put him in default, so it should not be essential to a recovery against a third person who is liable collaterally for the payment of the debt.

The rule, as finally established in the courts of the United States, is "That the liability of the guarantor will continue, unless he can show that he had sustained some prejudice by the want of notice of a demand on the debtor and his non-payment, and that if he has sustained any damage, he will be discharged only to the amount of that damage." *Wildes v. Savage*, 1 Story, 22 (ante, 88).

To render a failure to make a demand or give notice of the default, a defence, it must consequently appear presumptively or through some sufficient means of proof to have been injurious to the guarantor. As thus modified the rule may not be inconsistent with principle, if limited to cases where the guarantee is of a bill or note, because the

holder of such instruments is under an obligation to pursue the regular course of business, and may be held responsible for the consequences if he does not. It is well settled, that a creditor who takes a note or bill for a debt, must present it to the maker or acceptor and give the debtor notice of dishonor if he means to preserve his remedy against the latter. *Camidge v. Allenby*, 6 B. & C. 373; *Chamberlyn v. Delarive*, 2 Wilson, 353; *Turner v. Stones*, 1 D. & Lowndes, 131; *Price v. Price*, 16 M. & W. 345; *Dayton v. Trull*, 23 Wend. 345; *Douglass v. Howland*, 7 Peters, 38 (ante, 49); Notes to *Toby v. Barber* (post); and if this be true as it regards the principal, it must equally be so with reference to a third person, who has made himself answerable as a surety or guarantor. For as the note is, under these circumstances a security, and the debt will revive if it is not paid, the guarantor may reasonably require the creditor to use the accustomed means of obtaining payment of such instruments, and inform him if they fail. The statute 3 & 4 Anne, chap. 9, sec. 7, which would seem to be merely declaratory of the commercial, as embodied in the common law, is express, that the delivery and receipt of a negotiable instrument on account of a debt is payment unless the person who receives it takes the due course by endeavoring to get the same accepted and paid. *Price v. Price*, 16, M. & W. 232, 241, and although the statute is silent with respect to notice it is implied in the obligation to make a demand. Such a payment is conditional, to be absolute if the creditor does not pursue the usual course of business; and a failure to present the instrument and give notice that it is dishonored; will, consequently, be a defence to a suit on the consideration for which it was received, *Byles on Bills*, 230. The rule is not, however, enforced with as much strictness as in the case of an endorsement, and in *Gallagher's Exr's v. Roberts*, 2 W. C. C. R. 191, the omission of the creditor to present a bill which he had taken as conditional payment, and inform the debtor that it was dishonored, was held not to preclude an action for the recovery of the debt, because the position of the parties was unchanged, and there was nothing to indicate that the defendant was prejudiced by the delay. Such a defence will, however, stand good until it is rebutted, and the burden is on the plaintiff to show that his laches were not injurious to the defendant. Even when presentment is excused by the insolvency of the maker or acceptor, it may still be the duty of the holder to return or tender the instrument to the person from whom it was received. *Rogers v. Langford*, 1 C. & M. 637; *Robson v. Oliver*, 10 Q. B. 703; *Woodcock v. Bennett*, 1 Cowen, 713; *Dayton v. Trull*, 23 Wend. 345; *Camidge v. Allenby*, 6 B. & C. 373. In *Camidge v. Allenby*, the action was assumpsit for goods sold and delivered. The sale took place at York, on the 10th December, and during the afternoon of that day, the purchaser gave

the plaintiff four promissory notes in payment. It appeared in evidence, that the makers, who were bankers in the neighboring town of Huddesfield, stopped payment at 11 o'clock on the morning of the day on which the notes were given, but this circumstance was unknown to both the parties in the transaction. The plaintiff did not circulate or present the notes, nor did he take any step until the 17th of December, when he required the defendant to take them back and pay for the goods. Bayley, J., said that the rule as to a negotiable instrument taken in payment of a pre-existing debt, was that the debt would be discharged, unless the creditor did all that the law required, to obtain payment of the instrument. The plaintiff was bound to circulate the notes within a reasonable time, or present them for payment. If presentment was excused by the insolvency of the makers, it was the duty of the plaintiff to communicate their failure to the defendant, and that the plaintiff would hold him liable for the payment of the notes, and it would then have been for the defendant to consider whether he could recover over against the person from whom he received them. The neglect, therefore, on the part of the plaintiff, was presumably injurious to the defendant, by depriving him of a remedy which might otherwise have been enforced. The case of *Robson v. Oliver*, 10 Q. B. 704, recognizes the same principle, although it was held, that where the maker of a note which has been taken for a debt is insolvent, it is not necessary to present it, and the creditor may recover, on proving that he offered to return the note within a reasonable time. The result of the authorities, as a whole, would seem to be in accordance with the intimation of Lord Ellenborough, in *Swinyard v. Bowes*, 5 M. & S. 62, that demand and notice are (save as it regards a drawer or endorser) duties of imperfect obligation, which may be omitted when the circumstances are such that no benefit can result from their fulfilment, although the burden of showing this rests on the person who fails to pursue the ordinary course of business, *Hickling v. Hardy*, 7 Taunton, 313. In *Smith v. Mercer*, 3 Excheq. L. Reps. 51, Bramwell, Baron, said, that when a purchaser gives the note of a third person in payment without endorsing it, his liability cannot be greater than if he had endorsed the note, and will consequently cease, unless the instrument is presented when due, and notice given to him, it is not paid. See *Swinyard v. Bowes*, 5 M. & S. 62; *Van Wart v. Woolley*, 3 B. & C. 439; *Van Wart v. Smith*, 1 Wend. 213.

There is more difficulty in determining the rights and duties of the parties where a negotiable instrument is transferred as collateral security for a debt and not as a conditional payment. But demand and notice would still seem to be duties which cannot be omitted without risk. The rule that a creditor must take due care of the securities which are placed in his hands for the debt, and will be responsible if

they are lost or impaired through his negligence, *Wakeman v. Grundy*, 10 Bosworth, 208; *Kennedy v. Bossiere*, 16 La. 445; *Roberts v. Thompson*, 14 Ohio, N. S. 1; applies *a fortiori* to commercial instruments; *Nixon v. Lyell*, 5 Hill, 466; and although a holder is not bound to sue, he should still present the instrument at maturity and notify the debtor if it is not paid. *McLughan v. Bovard*, 4 Watts, 308; *Ormsby v. Fortune*, 16 S. & R. 302; *Douglass v. Reynolds*, 7 Peters, 113 (ante, 49). It will, however, be a good answer to such a defence, that the laches of the creditor were not injurious; and in *Swinyard v. Bowes*, 5 M. & S. 62, the failure to present a draft given for a debt was said to be excused by proof that the acceptor was insolvent when the instrument fell due, and became a bankrupt soon afterwards.

There is, however, a material difference between the transfer of a note as collateral security and in conditional payment. In the latter case the debt is suspended, and will not revive unless the creditor pursues the usual course of business. The burden is therefore throughout on him. When, however, a note is given as collateral, the debt subsists with all its incidents including an immediate liability to suit, and the debtor must prove payment or that the creditor has been guilty of negligence to his injury. Post, notes to *Toby v. Barber*.

A guarantor is entitled to take advantage of every defence that could avail the principal, and where the latter is discharged by the laches of the creditor, the guarantee will fall with the debt. *Phillips v. Ashting*, 2 Taunton, 206. In like manner, any neglect on the part of the creditor, which deprives the guarantor of a means of indemnity by discharging the drawers or endorsers of the securities held for the debt, will be a defence to the extent of the resulting injury. This results from the right of subrogation to the remedies of the creditor, and the duty of the creditor to keep them intact for the benefit of the guarantor. *Ex parte Mure*, 1 Coxe, 63; *Williams v. Price*, 1 Simon & Stewart, 581; *Beale v. The Bank*, 5 Watts, 529; *Goodloe v. Clay*, 6 B. Monroe, 236.

A guarantor is therefore entitled to require that notice shall be given to all the parties to whom he could have recourse for indemnity, and who will be discharged by the want of notice. But it does not follow that notice must be given to the guarantor, and it is clearly not essential under the English decisions, unless the contract guaranteed is a negotiable instrument, and the failure to give it would result in injury, which must be shown by the defendant, and will not be presumed by the law. *Vinal v. Richardson*, 13 Allen, 521. But this conclusion was not reached without some fluctuation of opinion, and dicta may be found indicating a different rule. *Morris v. Cleasby*, 4 M. & S. 574; *Illsley v. Jones*, 12 Gray, 266. In *Phillips v. Astling*, 2 Taunton, 206, the principal was discharged by the failure of the creditor to present

a bill which had been taken for the debt; and the discharge of the guarantor followed as a necessary consequence. But the court seem to have thought that the guarantor was entitled to notice of dishonor, and might rely on the failure to give it as a defence. In *Warrington v. Furber*, 8 East, 242, the plaintiffs, who had guaranteed the payment of goods, and were subsequently compelled to pay the debt, brought suit to recover the amount from the principal. It was alleged for the defence, that the failure of the creditor to present the bill which had been given for the price, discharged the guaranty. The plaintiffs were, therefore, not entitled to indemnity for a payment which had been made wrongfully, without legal cause. Lord Ellenborough said, that the strictness of proof which would have been essential in an action on the bill, was not necessary as against a guarantor, who insured the solvency of the principal. If the latter became bankrupt, or notoriously insolvent, it was the same as if he were dead, and it was nugatory to go through the ceremony of making a demand. The necessity for a demand, under ordinary circumstances, was in like manner conceded in *Holbrow v. Wilkins*, 1 B. & C. 10, but said to be excused by proof that the maker was insolvent.

These decisions showed that the right of a guarantor to notice is qualified, and can only be enforced on special grounds. It still remained to determine on whom lay the burden of averment and proof; whether the defendant was bound to establish, or the plaintiff to negative the existence of the injury which constitutes the gist of such a defence. In *Hitchcock v. Humphrey*, 5 M. & G. 550, the pleas to a suit on a guaranty were that the principal had accepted bills for the debt, which were not presented, and that notice of nonpayment had not been given to the guarantor. Chief Justice Tindal said: "The question whether the verdict for the defendant is sufficient to bar the plaintiff's judgment, or whether they are entitled to judgment *non obstante veredicto*, turns on the single point, whether a person who guaranties the payment of a bill drawn by the vendor of goods on the vendee for their price, puts himself in the same situation as the drawer of a bill. Because, if so, then by the law merchant, he is entitled to insist that the bill should be duly presented to the acceptor, and that he should have notice of its dishonor. But I find no case by which a party so guaranteeing is put upon that footing. On the contrary, *Warrington v. Furber* and *Halbrow v. Wilkins*, show the true distinction between the case of a drawer and that of a party giving such a guaranty. The latter merely undertakes that the acceptor shall pay the bill; and he only can have a right to insist on notice of dishonor, when some damage would result to him from the want of it. No such damage is suggested in these pleas; and for these

grounds, I am of opinion, that they contain no answer to the action, and that the plaintiff is entitled to judgment *non obstante veredicto*."

It results from what is here said, that demand and notice are not conditions precedent to be averred and proved by the creditor, and that the guarantor must show that they are material to the contract, if he means to rely on the want of them as a defence. *White v. Woodward*, 5 C. & B. 810; *Vinal v. Richardson*, 15 Allen, 521; *Walton v. Mascall*, 13 M. & W. 72.

It was accordingly held in *Walton v. Mascall*, that a plea to an action on a guaranty of a note, that the guarantor did not receive notice of dishonor, is frivolous, and may be struck off on motion unless it also avers that he was injured by the omission. The case was heard subsequently on a demurrer to a plea averring that the note was not presented at maturity; which raised the question whether the declaration was defective for not averring that a demand had been made on the maker. The court were, however, of opinion with the plaintiff on both points. "The real question," said Pollock, C. B., "under such a plea is, whether the averment of a request to pay has a different meaning in a declaration against the maker of a note, and in a declaration against a guarantor for the maker. It seems to me that it means the same thing in both cases; it would lead to much inconvenience to hold the contrary. Now, against the maker of the note, that allegation would be mere form, it must be sufficient to say, that he had not paid the sum of money in the note specified, according to the tenor and effect thereof. And if that would be sufficient as against him, it must be equally so against the guarantor. The real contract is that the makers of the note shall pay it, according to its tenor and effect; and it is clear, they are bound to find out the holder and pay him the amount when the note becomes due. It appears to me, therefore, that a presentment and request are immaterial; and that our judgment must be for the plaintiff."

This case, like that of *Swinyard v. Bowes*, 5 M. & S. 52, might at first appear to establish that the drawer or endorsers are the only persons entitled to notice of the dishonor of a bill or note. The point actually determined is, however, not that the want of notice is necessarily immaterial, but that it will be so until the contrary is made to appear. Every one who is responsible for the payment of a debt is entitled to require that the negotiable securities held for it shall be duly presented, and information given if they are not paid. *Vinal v. Richardson*, 5 Allen, 531, 532. This right is admitted to exist between the creditor and the principal, and cannot reasonably be withheld from the guarantor. The result of the English and the best considered American decisions would therefore seem to be that demand and notice are not essential to complete the breach of a guaranty, or confer a right of

suit. *Vinal v. Richardson*, 13 Allen, 521, 532. Where, however, the contract guaranteed is a negotiable instrument, or a negotiable instrument is given as a security for the performance of the contract, the creditor must pursue the ordinary course of business, by presenting the instrument for payment and giving notice of non-payment to all the parties in interest, whether their names do or do not appear on the note or bill. *Jones v. Pierce*, 35 New Hampshire, 295. Even here, however, the obligation is not imperative, and may be disregarded where no injury will result from the neglect. This distinction was pointed out by Ford, J., in *Woolley v. Sargeant*, 3 Halstead, 362, and *Phillips v. Astling*, and the long train of cases in which it has been cited as establishing the necessity for notice, said to depend on the doctrines of the commercial law with regard to negotiable instruments. *Salisbury v. Hale*, 12 Pick, 416, 424, might be cited to the same point, were it not that the court intimated that mercantile contracts require demand and notice equally with bills and notes. Such a doctrine would be too vague for application if it were legally sound. The law affords no criterion for distinguishing commercial contracts, nor are they, except in the case of negotiable instruments, governed by peculiar rules.

The distinction has, however, been to a great extent overlooked or disregarded in the United States, and demand and notice held to be requisite, wherever one man binds himself for the fulfilment of the contract of another. *Bastford v. Shaw*, 4 Ohio, N. S. 268; *Virden v. Ellsworth*, 15 Indiana, 144; *Cox v. Brown*, 6 Jones, 100; *Cahusac v. Samini*, 29 Alabama, 282; *Dale v. Young*, 24 Pick. 230; *Curtis v. Dennis*, 7 Metcalf, 510; *Clark v. Remington*, 11 Id. 361; *Wildes v. Savage*, 1 Story, 22; *Smith v. Bainbridge*, 6 Blackf. 12; *Rankin v. Childs*, 9 Mis. 674; *Howe v. Nickles*, 22 Maine, 175; *Lawson v. Townes*, 2 Ala. 373. But it is at the same time generally conceded, in accordance with *Douglass v. Reynolds*, that they are not conditions precedent which must be observed in order to enforce the guaranty; *Vinal v. Richardson*, 13 Allen, 521; and that the want of demand and notice will not be a defence unless it is injurious to the guarantor. *Walker v. Forbes*, 25 Alabama, 139; *Paige v. Parker*, 8 Gray, 211; *Rhett v. Poe*, 2 Howard, 457; *The Louisville Man. Co. v. Welsh*, 12 Id.; *Salisbury v. Hale*, 12 Pick. 416; *Simons v. Steele*, 36 New Hampshire, 73, 80; *Bashford v. Shaw*, 4 Ohio, N. S. 263.

Such injury will, it seems, be inferred from evidence, that the principal was solvent when the debt fell due, and became insolvent before demand was made and notice given of the default; *Woodson v. Moody*, 4 Humphreys, 303; *The Oxford Bank v. Haynes*, 8 Pick. 423; *Talbot v. Gay*, 18 Id. 534; *Gamage v. Hutchins*, 23 Maine, 565; *The Globe Bank v. Small*, 25 Id. 366; *Beeker v. Saunders*, 6 Iredell, 380; *Moy-*

*berry v. Boynton*, 2 Harrington, 24; *Whitton v. Mears*, 11 Metcalf, 563; and may be disproved on the other hand by showing that nothing has occurred to vary the position of the guarantor, or lessen his means of security against loss. This may be done by showing the insolvency of the principal, at the maturity of the debt (ante, 56). *Gibbs v. Cannon*; *Rhett v. Poe*; *The Louisville Man. Co. v. Welsh*; *Simons v. Steele*; or if he was solvent then, that his assets are still adequate to the fulfilment of his obligations. *Vinal v. Richardson*, 13 Allen, 521, 528; *Salisbury v. Hale*, 12 Pick. 416, 424; *The Oxford Bank v. Haynes*, 8 Id. 423. Other circumstances may apparently excuse the want of demand or notice, as, for instance, that the principal is dead (ante, 56); or that the guarantor knew, or had the means of knowing the default. *Vinal v. Richardson*, 13 Allen, 521, 533, (ante).

It has also been held that the law will not presume injury from the want of demand and notice, unless it is shown; and that the burden of allegation and proof is therefore on the guarantor. *The Farmers' and Mechanics' Bank v. Kircheval*, 2 Mich. 504; *Bushnell v. Church*, 15 Conn. 406; *Wildes v. Savage*, 1 Story, 22 (ante, 88); *Howe v. Nickles*, 22 Maine, 175; *Rankin v. Childs*, 9 Missouri, 674; *Dale v. Young*, 24 Pick. 250; *Johnson v. Wilmarth*, 13 Metcalf, 416; *The Protection Ins. Co. v. Davis*, 5 Allen, 54; *Vinal v. Richardson*, 13 Id. 521; *Gilligan v. Boardman*, 29 Maine, 79; *Fear v. Dunlap*, 1 Iowa, 303; *The Bank of South Carolina v. Kuttis*, 10 Richardson, 543; *Paige v. Parker*, 8 Gray, 211; *The Salem Man. Co. v. Brown*, 4 Jones, 429. It was indeed said in *Dunbar v. Brown*, 4 McLean, 166, that the neglect of the creditor will give rise to a presumption of injury, which can only be rebutted by proof that the principal was insolvent when the debt matured, but this doctrine is at variance with the general course of decision.

Under these decisions notice is not requisite to complete the obligation of the contract, and is merely one of several circumstances that may together constitute a defence on the ground of negligence and resulting loss. *Vinal v. Richardson*, 13 Allen, 521, 528. In *Vinal v. Richardson*, the court said that the true ground of defence in such cases was loss from negligence. It was the laches of the creditor in permitting the claim to slumber when the guarantor might reasonably suppose that it had been paid, which exonerated the guarantor. Notice was not requisite, nor the want of it a bar, if the creditor sued at once, and if he did not, it was the delay without notice, and not the want of notice that constituted the defence. This explanation is not, however, altogether satisfactory. A guaranty is a mode of the contract of suretyship, and it is well settled that delay or indulgence will not discharge a surety, even when it results in a loss of the remedy against the principal. *Locke v. The U. S.*, 3 Mason, 446; *U. S. v.*



*Simpson*, 3 Penna. Rep. 336 ; Post, Notes to *King v. Baldwin*. Notice cannot be required consistently with principle, unless the contract guaranteed is a note or bill.

The authorities are, however, far from being consistent, and while many of the American decisions agree with the English, that the want of demand and notice is immaterial unless injury results which must be shown by the guarantor; *Rhett v. Poe*, 17 Howard, 455, 457; *Lawrence v. McCalmont*; *Louisville Man. Co. v. Welch*; *Vinal v. Richardson*; notice is viewed in others as a condition precedent, which must be alleged by the creditor, or the want of it excused by proper averments. *Cox v. Brown*, 6 Jones 100; *Cahusac v. Samini*, 29 Alabama, 288; *Pickford v. Gibbs*, 8 Cushing, 154; *Illsley v. Jones*, 12 Gray, 262. In *Illsley v. Jones*, a declaration on a guaranty of the price of goods sold by the defendant on a *del credere* commission, was held insufficient for not alleging that a demand had been made on the principal, and notice of default given to the guarantor. In *Becker v. Saunders*, 6 Iredell, 380, an unreasonable delay in giving notice, was said to afford sufficient proof of negligence; while in *Lawson v. Townes*, 2 Alabama, 373, and *Walker v. Forbes*, 25 Id. 139, 149, the declaration was held bad on demurrer, for not alleging notice of the default of the principal in not paying the amount due under a prospective guaranty, which necessarily implies that the burden of proof is on the creditor. The language held by Duncan, J., in *Gibbs v. Cannon*, 9 S. & R. 198, inclines to this view of the question, although the decision was that notice need not be specifically averred. And while a guaranty of an existing demand may be enforced in Alabama, without demand or notice (ante, 116), the courts of that State hold that notice is essential to the right of action on a letter of credit or future or prospective guaranty, and must be specifically averred in the declaration; *Lawson v. Townes*, 2 Ala. 373; *Walker v. Forbes*, 25 Id. 139, 149; *Fay v. Hall*, Id. 704; *Cahusac v. Samini*, 29 Id. 288. In *Lewis v. Brewster*, 2 McLean, 31, a declaration averring the non-payment of the note sued on, and that notice was given to the guarantor, was held deficient in not showing that he had been notified within a reasonable time, which is manifestly inconsistent with the doctrine that a want or delay of notice will be immaterial, unless injury is made to appear. In *Fraser v. Bowler*, Ib. the position of a guarantor was likened to that of an endorser, and he was said to be equally entitled to notice, although it need not be given with as much promptitude or exactness. In like manner, a demand upon the maker of the note guaranteed and notice of its dishonor to the guarantor, were treated as conditions precedent to the right of action against the latter, in *Sage v. Wilcox*, 6 Conn. 81; *Greene v. Dodge*, 2 Ohio, 430; *Parker v. Riddle*, 11 Id. 102; *Grice v. Ricks*, 2 Devereux, 62; *January v. Duncan*, 3 McLean, 19, and *Bar*

ber v. Moore, Id. 387; while in *Smith v. Bainbridge*, 6 Blackford, 12, and *Rankin v. Childs*, 9 Missouri, 674, the court seem to have regarded notice of the default of the principal, as an essential element, without which the plaintiff could not succeed.

On the other hand, in *Thrasher v. Ely*, 2 Smedes & Marshall, 139, a recovery was allowed on a guaranty of a promissory note, without an averment of demand or notice, although it was conceded that if the want of either had been injurious it would have been a defence to the extent of the loss. The same view was taken in *Vinal v. Richardson*, 13 Allen, 521, and *Rhett v. Poe*, 7 Howard, 454, and these decisions are sustained by the *Farmers' & Mechanics' Bank v. Kircheval*, 2 Mich. 504, and *Bushnell v. Church*, 15 Conn. 406. And the necessity for demand and notice is denied in New York, even when the contract guaranteed is a bill of exchange or promissory note. *Allen v. Rightmeyer*, 20 Johnson, 365 (ante 118).

In *Allen v. Rightmeyer*, the court said that a guarantee of a promissory note, was governed by the ordinary rule under which the debtor must seek out and pay his creditor, without waiting to be quickened by a demand. The same view was taken in *Crumpston v. McNair*, 11 Wend. 457, 461; *Luqueer v. Prosser*, 1 Hill 236, 4 Id. 423; and *Curtis v. Brown*, 2 Comstock, 235, and a failure to demand payment of a promissory note and give notice that it was not paid, held not to discharge the guarantor, although coupled with proof that the maker was solvent when the note matured, and became insolvent subsequently. It was said that demand and notice were not requisite, except to charge a drawer or endorser. A guarantor entered into an unconditional agreement that the debt should be paid when due, and it made no difference that the contract guaranteed was a negotiable instrument. The same point was decided in *Mallory v. Grant*, 4 Chandler, 423: and in *Donly v. Camp*, 22 Alabama, 659, the court held that the necessity for demand and notice, was confined to continuing and prospective guaranties, and did not arise where the guarantor became answerable for the fulfilment of a specific and existing obligation, although in the form of a promissory note. And in *The Union Bank v. Coster*, 3 Comstock, 20, the creditor was, perhaps with less reason, allowed to recover, notwithstanding his omission to present negotiable securities, which has been given by the principal on account of the debt.

The language of Chief Baron Pollock, in *Walton v. Mascall* (ante, 126), would seem to indicate that the English courts have reached the same conclusion, and do not require demand and notice, even when the contract guaranteed is a negotiable instrument. In *Murray v. King*, 5 B. & Ald. 165, the defendant joined the drawer of a bill in executing a bond conditioned to be void if the bill should be paid within one month after it fell due. The court said, that whatever the rule might

be where the guarantors were strangers to the instrument, the motive for a guarantee by a drawer or endorser obviously was to render his conditional liability absolute, and exonerate the plaintiff from the diligence required by the commercial law. Yet so various are the conclusions which may be drawn from the same premises, that in *Sneely v. Ekel*, 1 W. & S. 203, words of guaranty superadded to an endorsement, were held to limit the liability of the endorser to an engagement for the solvency of the maker, which could not be enforced without obtaining judgment against him, followed by a return of *nulla bona*.

The rule that a man who stipulates for the acts of another, must see to it, that they are performed, is so well settled, that the courts have been driven to the not very intelligible distinction, that a guaranty being a collateral engagement that another shall do something to which he is directly bound, is not broken until the principal is summoned to keep his engagement, and notice given of his default. *Beebee v. Dudley*, 6 Foster, 249; *Coxe v. Brown*, 6 Jones, 100; *Virden v. Ellsworth*, 15 Indiana, 144; *Gamage v. Hutchins*, 23 Maine, 365; *The Glade Bank v. Sewell*, 25 Id. 366; *White v. Walker*, 31 Illinois. In *White v. Walker*, the court said, that as the non-payment of the debt must be known to the creditor, and might not be known to the guarantor, it should therefore be communicated to the latter before suing him for the default. These decisions recognize the principle that a man who stipulates for the act of another must take notice at his peril, but treat it as inapplicable where the other enters into a collateral agreement to do the act. *Lane v. Sevillian*, 4 Pike, 76; *Gamage v. Hutchins*, 23 Maine, 565; *Howe v. Nickels*, 22 Id. 175; *Read v. Cutts*, 7 Id. 186; *Cobb v. Little*, 2 Id. 261; *Cooper v. Page*, 14 Id. 73.

The necessity for a demand results, in this aspect of the case, from the obligation of the principal to do the act stipulated for by the guarantor, and the consequent duty to put him in default before proceeding against the latter. It follows from these premises, that when the agreement of the guarantor differs in any material circumstances from that of the principal, as where the one is payable generally, and the other at a day certain, a demand will be superfluous. *Beebee v. Dudley*.

It has been held, for a like reason, that when a note or bill is overdue when guaranteed, the obligation of demand and notice does not arise, and the guarantor will be liable on proof of the default of the principal; *Williams v. Granger*, 4 Day, 434; *Breed v. Hillhouse*, 7 Conn. 523; *Breed v. Cutts*, 7 Maine, 186; *Cooper v. Page*, 16 Id. 73; and the same conclusion was drawn in *Cobb v. Little*, 2 Maine, 261, where the promise of the guarantor was made before the instrument became due, but stipulated that it should be paid at a time subsequent

to that at which it would mature. These cases appear to overrule *Sage v. Wilcocks*, 9 Conn. 81, where it was held, under like circumstances, that demand and notice were not only requisite, but must be alleged in the declaration, and proceed on the ground that a demand is not essential unless the obligations of the guarantor and principal are coincident.

In *Beebee v. Dudley*, 6 Foster, 249, the distinction was in like manner said to be between collateral contracts and those where the promisor is solely answerable. The argument is so far just, that unless the person for whose act the guarantor stipulates is under a direct engagement, there is no room for demand or notice; but it does not follow that demand and notice are essential because the principal is bound collaterally to the guarantor. Such a distinction would be foreign to the doctrines of the common law, under which a man who enters into an engagement must obtain all the necessary information for its fulfilment, whether the obligation which it imposes rests exclusively on him, or is collateral to that of a third person. *Vinal v. Richardson*, 13 Allen, 527, 532; *Thrasher v. Ely*, 2 Smedes & Marshall; *Hammond v. Gilmore*, Admr.; *Doulgass v. Howland* (ante, 61, 62). Whether the contract be that a third person shall fulfil a contract into which he has entered, or that he shall do something to which he is bound by no obligation, whether it stipulates for performance by the principal, or merely to be answerable for his default, the substantial meaning is the same and should not be defeated by technicalities. In whichever way the engagement is worded, it will be broken if the act is not done when the time arrives, and the question is not whether the promise is direct or collateral, but whether it has been fulfilled (ante, 126). *Vinal v. Richardson*, 13 Allen, 521, 532. Thus in *Brookbank v. Taylor*, Croke James, 685, the promise was collateral, that if the tenant did not pay his rent the defendant would pay it for him, but the court said that the plaintiff was under no obligation to give notice of the default of the tenant, because the defendant was bound to take notice of it at his peril. The law was held the same way in *Duval v. Trask*, 12 Mass. 154, and judgment given against the defendant on a promise to be answerable for such goods as his brother might purchase, without demand or notice although the promise was not only collateral, but depended on a future and uncertain event. If we view the promise of the principal as a collateral security for that of the guarantor it still does not make out the case. A creditor who has the means of satisfying the debt in his hands should keep them unimpaired, and will be answerable for any loss that may occur through his neglect, but he is under no obligation to take active measures to compel payment, unless required to do so by the debtor, and then only if the latter will bear the necessary costs and charges. The obligation rests upon him who makes a promise, not on him to whom it is made,

and it is for the former, not the latter, to see that it is fulfilled. The guarantor may require the creditor to proceed against the principal, but until he does the responsibility of delay should rest upon the guarantor.

In *McDougall v. Calef*, 35 New Hamp. 534, it was said with more reason, that a man who promises that an act shall be done by another at a day certain, or that he will do it if the other does not, must take notice at his peril, although a different rule applies when the agreement is to indemnify against loss, or depends upon a contingency exclusively within the knowledge of the plaintiff. A guarantee of the goodness of a debt has been held to fall within this principle, and will require notice of the failure of the measures taken to collect the debt before suit is brought against the guarantor. *Sylvester v. Downing*, 8 Vermont, 32; *Lewis v. Bradley*, 1 Id. 303; *Illsley v. Jones*, 12 Gray, 260. The better opinion would, however, seem to be that notice is not necessary, even when the guarantee is of the solvency of the principal, or that the debt may be collected with due diligence, because the fact may be ascertained by inquiry, and is not exclusively within the knowledge of the creditor. *Stevenson v. Marks*, 24 Barb. 325.

The common law clearly is, that when the surety binds himself unconditionally for the fulfilment of the contract of the principal, demand and notice are not essential. *Noyes v. Nichols*, 28 Vermont, 160; *Redfield v. Haight*, 27 Conn. 33; *Vinal v. Richardson*, 13 Allen, 521; *Marberger v. Potts*, 4 Harris, 9, 13; *Walton v. Mascall*, 13 M. & W. 72 (ante, 126); and it was said in *Vinal v. Richardson*, that when the guarantee is absolute in terms that a specific act shall be done by another, demand and notice need not be averred, although the want of them may be a defence on the ground of negligence, to the extent of the resulting injury. The argument for notice from the existence of a collateral contract would seem to be fallacious, because a man who promises for another, is equally responsible, whether the latter does or does not promise for himself. *Vinal v. Richardson*, 13 Allen, 521, 532. When, however, the contract is in terms or substance, not that an act shall be done, but to save the promisee harmless if it is not, it may be contended with more reason, that the nature and extent of the loss should be made known before bringing suit; and in *Illsley v. Jones*, 12 Gray, 260, the court relied on *Morris v. Cleasby*, 4 M. & S. 566, 574, as showing that a broker who sells on commission and guarantees the payment of the price, is not liable, without a demand on the purchaser, and notice of his default. The duty of pressing for and obtaining payment obviously devolves, however, under these circumstances primarily on the agent, and the principal cannot be required to make a demand and give notice consistently with the object which the parties have in view in making the contract, which is to secure certainty and prompt-

itude. *Illsley v. Jones* was accordingly overruled in *Vinal v. Richardson*, 13 Allen, 521, 531.

A guaranty may, however, vary as widely as the use of language and the nature of the subject matter will permit; and when the contract is in terms or substance that the demand guaranteed is good and may be collected by due diligence, or that the principal is solvent and will be able to meet his engagements, the proof must follow the allegation, and a recovery cannot be had without showing the insolvency of the principal debtor, or that payment could not be obtained by a recourse to legal proceedings. *Dyer v. Gibson*, 16 Wisconsin, 557; *Poster v. Barney*, 3 Vermont, 60; *Sylvester v. Downer*, 18 Id. 32; *The Turnpike Co. v. Coy*, 15 Id. 84; *Benton v. Fletcher*, 31 Vermont, 418; *Moakely v. Riggs*, 19 Johns. 69; *Cumpston v. McNair*, 1 Wend. 457; *Mackus v. Sheppard*, 11 Id. 629; *Curtis v. Smallman*, 14 Id. 231; *Loveland v. Sheppard*, 2 Hill, 139; *Vanderveer v. Wright*, 6 Barb. 547; *Goodall v. Stuart*, 2 Hen. & Mun. 115; *McDowall v. Yeomans*, 8 Watts, 361; *Hall v. Hadley*, 2 A. & E. 258; *Wolfe v. Brown*, 5 Ohio, N. S. 304.

The endorsement of a note by a stranger, is interpreted in Connecticut as a warranty of the solvency or ability of the maker, and the latter must consequently be pushed to insolvency before proceeding against the guarantor. *Clark v. Merian*, 2 Conn. 246; *Laylin v. Pomeroy*, 11 Id. 440; *Paschal v. Candee*, 16 Id. 223. In New York, on the other hand, demand and notice are exceptionally necessary under these circumstances, but the maker need not be sued. *Waterbury v. Sinclair*, 46 Barb. 45.

The best evidence of insolvency is a return of *nulla bona* to a writ of *fiery facias*; but the failure to pursue this course may be supplied by proof that the principal is notoriously unable to pay his debts; *Douglas v. Reynolds*, 12 Peters (ante, 55); *Cady v. Sheldon*, 28 Barb. 103; *McDowall v. Yeomans*, 8 Watts, 361, although this has been denied in some instances, and a judgment and execution against the principal held to be conditions precedent to a recovery against the guarantor. *Cady v. Stanton*, 21 Wend. 255; *Dyer v. Graham*, 15 Wis. 567. The weight of authority, however, is that insolvency may like other facts be proved by the whole range of parol evidence, without the expense and delay of a resort to process that must from the nature of the case, be fruitless; See *Come v. Nutt*, 14 B. Monroe, 324; *Hays v. Morrill*, 2 Harris, 48; *Benedict v. Schættles*, 12 Ohio, N. S. 515. On the other hand, the presumption arising from a return of *nulla bona*, may be repelled by proof that due effort was not used to make the writ effectual, unless the guarantor was informed of the proceeding, and asked to superintend or direct the levy.

A guarantor may also, instead of stipulating for an act in pais, agree

to be answerable for such defaults if any as shall be ascertained by judicial investigation. The sureties in a replevin bond covenant that the suit shall be prosecuted with effect, or the goods returned if a return be awarded, and the liability of bail to the action depends on the amount recovered against the principal. An eviction by legal process is in like manner the best evidence of the breach of a warranty of title to lands or chattels; *Blasdale v. Babcock*, 1 Johnson, 517; *Vibberd v. Johnson*, 19 Id. 77; because the contract is not so much, that the title is good, as that the purchaser shall be indemnified against legal injury if it prove deficient. And the obligation of the sureties in the official bonds of executors and administrators, has been limited by judicial interpretation to the amount due by the principal as ascertained by the judgment or decree of some competent tribunal. *Justice v. Sloan*, 7 Georgia, 31. A recovery cannot, therefore, be had against the sureties of an administrator for a *devastavit*, without first proceeding against the administrator, and fixing his liability by a judgment. *The Commonwealth v. Evans*, 1 Watts, 437; *The Commonwealth v. Fritz*, 4 Barr, 344; *Dikins v. Bailey*, 1 Cushman, 284.

It might be difficult for the utmost stretch of ingenuity to interpret a promise, that the principal shall pay the debt when due, and that if he does not, the promisor will pay it for him, as other than a conditional liability, to become absolute if the letter of the engagement is not fulfilled; but the contract of the guarantor may be so vague or general, as to make it doubtful whether he means to stipulate that the debt shall be paid, or merely that it may be collected from the principal, if the creditor proceeds with due diligence. In *Russell v. Buck*, 11 Vermont, 166, the writing sued on contained two stipulations; one that a note was susceptible of collection, the other, that if the creditor could not succeed in collecting it within a certain time, it should be paid by the defendant. The majority of the court held that it was an undertaking for the goodness of the debt, which could not be enforced without proof that due effort had been made to obtain the money by a suit against the maker, while Bennett, J., was of opinion that taking the instrument as a whole, it was the duty of the creditor to pay if the principal did not.

These remarks may explain an anomalous series of decisions, which cannot be reconciled with any established rule. A guarantee is arbitrarily interpreted in Pennsylvania as a warranty of the goodness of the debt, and that it may be collected by proceeding to judgment and execution. The point arose in *Rudy v. Wolff*, 16 S. & R. 79; upon a covenant "to be security" for payment of a bond which was assigned to the covenantee. This was said to be an agreement to pay the money on the insolvency of the obligor, provided the creditor used due diligence. If the debt was lost through his laches, the guarantor would

be discharged. In *Johnson v. Chapman*, 3 Penna. Rep. 18, the operative words were, "I guaranty the payment of the within bond," and were interpreted in the same way. In *Iselt v. Hoge*, 2 Watts, 128, a third person gave a promissory note to the plaintiff, and the defendant wrote below, "I do hereby guaranty the payment of the above note." The court said that under *Johnson v. Chapman*, a guaranty was an engagement to pay upon the insolvency of the debtor, provided due diligence was used to obtain payment from him. Merely to demand payment was not due diligence. Eight years had been suffered to elapse without suit, during which the estate of the principal had been levied on and sold by other creditors, and the defendant was not liable for a loss which had presumably occurred through the supineness of the plaintiff. These decisions were followed in *Snevily v. Ekel*, 1 W. & S. 203, although the guaranty was superadded to an endorsement, and presumably intended to enlarge rather than limit the liability arising from the latter (ante, 131). General words of guaranty were similarly interpreted in *Lewis v. Hoblitzell's*, Adm. 7 Gill & J. 259; *Granis v. Miller*, 1 Alabama, 471; *Nesbit v. Bradford*, 6 Id. 746; *Janvier v. Mulford*, 2 Harrington, 28, and *Sage v. Wilcox*, 6 Conn. 81; and the test of legal diligence in Delaware and Alabama, seems to be a writ issued to the next term of the court, and pursued in due course of law to judgment. It may be added that agreeably to the decisions in Maryland and Virginia, the assignment of a debt for a valuable consideration implies a warranty of the solvency of the debtor, and that the debt may be collected with due diligence. *Mackie v. Davies*, 2 Washington, 219; *Barksdale v. Fenwick*, 2 H. & M. 113; *Crawford v. Berry*, 6 Gill & J. 63. But these decisions like those above cited, are departures from the course of the common and commercial law.

It is, however, generally conceded, that the insolvency of the creditor will exercise a failure to proceed by suit, and constitute a breach of the contract for which suit may be brought against the guarantor. *Lewis v. Hoblitzel*; *McDoal v. Yeomans*, 8 Watts, 361; *Goodall v. Stewart*, 2 H. & M. 113.

It results from this course of decision, that in declaring on such a guaranty, the plaintiff must aver either that due diligence was used to collect the debt, or that the principal was insolvent when it matured. *Parker v. Culvertson*, 1 Wallace, Jr., 149. In *Parker v. Culvertson*, the defendant covenanted "to guaranty the payment of the debt or sum of \$6,000, as secured by the bond of a third person," which was recited in the covenant, and a declaration in the ordinary form, alleging that the bond had not been paid by the principal obligor or by the defendant, was held bad on demurrer as not showing a breach of the covenant. The court said that the bond, having been executed in Pennsylvania, was governed by the *lex loci contractus*, which required the creditor to



exhaust his remedies against the principal, before proceeding to charge the guarantor. It follows conversely, that where the contract as alleged in the declaration, is, that the principal shall pay the debt, and not that it is good, or susceptible of collection, the defendant cannot require the plaintiff to prove the diligence, which he has not averred, and must craveoyer and demur, or object to the instrument at the trial on the ground of variance.

These decisions are based on the assumption that a guaranty is not an engagement that the debt shall be paid, but that payment may be obtained by proceeding in due course of law. *Brown v. Brooks*, 1 Casey, 210; *Reigart v. White*, 2 P. F. Smith, 438. When, therefore, the contract is unequivocally that the debt shall be paid at the day, suit may be brought forthwith against the guarantor, without pushing the principal debtor to insolvency. *Street v. Silver*, Brightly, 96. A guaranty of punctual or faithful payment, or that the debt is as good as gold, and shall be paid when due, is accordingly construed in Pennsylvania, agreeably to the plain import of the words, as a promise to pay if the principal does not, which will be broken if payment be not made at the time prescribed; *Koch v. Melhorn*, 1 Casey, 89; *Campbell v. Baker*, 10 Wright, 243; *Allen v. Hubert*, 13 Id. 259; *Reigart v. White*, 2 P. F. Smith, 438; and the result will be the same when the guarantor fixes the time for payment, by stipulating that the plaintiff shall have his money before the end of the year; *Cochran v. Dawson*, 1 Miles, 76. So when the defendant wrote on the back of a note, "I will see the within paid," he was held to be directly liable; *Amsbaugh v. Gearhart*, 1 Jones, 482.

In *Marberger v. Pott*, 4 Harris, 9, a promise endorsed on a bond "to be security for the within amount of \$600, until satisfactorily paid by the obligor, William Audenreid," was held to render the defendant responsible, without a demand on Audenreid or proof of his insolvency; and a similar interpretation was put in *Craddock v. Armor*, 10 Watts, 238, on a promise to be "security for the fulfilment of the within agreement." These cases virtually overrule *Rudy v. Wolf*, and are not reconcilable with *Johnston v. Chapman*, and *Isett v. Hage*, although the court took a not very intelligible distinction between a promise to be "security" for the engagement of another, and a "guaranty" that it shall be fulfilled. An agreement that another shall fulfil an agreement into which he has entered, is a guaranty however worded; and the test in pleading is the necessity for alleging a breach by the principal. When, however, there are no words limiting or defining the meaning of a guaranty, it is still interpreted in Pennsylvania as an engagement to indemnify the creditor, if the debt cannot be collected by proceeding with due diligence in the ordinary course of law; *Hoffman v. Bechtel*, 2 P. F. Smith, 190.

The case of *Douglass v. Reynolds* is a leading one on another point about which the authorities do not agree. It is whether a guaranty, which is alleged to be continuing, should be construed strictly in view of the position of the defendant as a surety, or liberally in aid of the design to secure the creditor. *Mayer v. Isaac*, 6 M. & W. 605, 612; *Noyes v. Nichols*, 28 Vermont, 160.

In *Nicholson v. Paget*, 1 Cr. & M. 48, a letter promising to be answerable for the payment of £50 for T. Lerigo, in case T. Lerigo does not pay for the gin which he receives from you, and will pay the amount," was held not to extend beyond the first fifty pounds worth of gin sold to the principal. Bailey, J., said that a party who furnished goods on the faith of a guaranty, should take care that it was so worded as to define the liability of the guarantor, and as this had not been done in the case under consideration, the defendant was entitled to judgment. It was said in like manner by Ch. J. Marshall, in *Russell v. Clarke's Ex'rs*, 7 Cranch, 79, that the law would not compel a man to pay a debt growing out of a transaction in which he had no interest, unless he manifested a clear intention to make himself answerable. So in *Wayman v. Hoag*, 14 Barb. 282, Hurd, J., observed, that "an agreement must be explicit, to charge one man with the debt of another, and more particularly by a continuing guarantee." On the other hand, it was held in *Mason v. Pritchard*, 12 East. 227, that the words were to be taken as strongly against the guarantor as the sense would admit of, and the same rule was laid down in *Drummond v. Priestman*, 12 Wheaton, 515. When the question arose in *Mayer v. Isaac*, 6 M. & W. 605, Parke Baron, said that the doctrine of Bailey, J. in *Nicholson v. Paget*, was at variance with the general rule of the common law, that the words of an instrument are to be taken most strongly against the party using them. A guaranty was one of a class of obligations which are binding only on one of the parties, until the other makes the contract his own, by acting on it. The words were those of the guarantor, not of the creditor, and the construction should therefore be in favor of the latter, if the case was one which admitted of a reasonable doubt.

These dicta are not, however, irreconcilable, and there may be room for the application of both principles. As a guarantor does not share in the benefit of the consideration, and is only bound by the contract, his liability should not be carried further than the terms of the contract justly warrant, and when the language admits of two interpretations, that may reasonably be preferred which relates to what the parties have in view at the time, and excludes future and unforeseen contingencies; *Rogers v. Warner*, 8 Johnson, 119; *Webb v. Dickinson*, 11 Wend. 12; *Cremer v. Higginson*, 1 Mason, 323; *Boyer v. Ewart*, Rice, 126; *Melville v. Hayden*, 3 B. & Ald. 593;

*Fellows v. Prentiss*, 3 Denio, 512; *The Agawam Bank v. Sherer*, 16 Barb. 851; *Bailey v. Larcher*, 5 Rhode Island, 530; unless the instrument is so worded as to convey the impression, that the guarantor means to assume a more extensive responsibility, when his language will be construed, not merely with reference to the sense in which it may have been used by him, but also to that in which it would naturally be understood by the person to whom it was addressed; *Mason v. Pritchard*; *Mayer v. Isaac*; *Hargrave v. Smee*, 6 Bing. 244; *Douglass v. Reynolds*, 7 Peters, 113; *Bent v. Hartshorn*, 1 Metcalf, 24; *Allen v. Pike*, 3 Cushing, 238; *The Farmers' and Mechanics' Bank v. Kercheval*, 2 Mich. 304; *Lowe v. Beckwith*, 14 B. Monroe, 124; *Bell v. Bruen*, 1 Howard, 169; *Lee v. Dick*, 10 Peters, 482; *Mauran v. Bullus*, 16 Id. 528; *Noyes v. Nichols*, 2 Williams, 159; because no man should be allowed to induce another to give credit by the use of ambiguous language, and then shelter himself from responsibility behind a doubt of his own raising. *Lawrence v. McCalmont*, 2 Howard, 426, 450; *Scott v. Myell*, 24 Alabama, 129; *Bailey v. Larcher*.

The law was so held in *Douglass v. Reynolds* (ante, 44), and again in *Lawrence v. McCalmont*, where the question was summed up by Story, as follows: "Some remarks have been made on the argument here, upon the point in what way letters of guaranty are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatever in saying, that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments—generally drawn up by merchants in brief language—sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care, would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for the extensive credits, so often sought in the present active business of commerce throughout the world. The remarks made by this court in the case of *Bell v. Bruen*, 1 How. R. 169, 186, meet our entire approbation. The same doctrine was asserted in *Mason v. Pritchard*, 12 East R. 227, where a guaranty was given for any goods 'he hath or may supply W. P. with, to the amount of £100;' and it was held by the court to be a continuing guaranty for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first stipulated and paid for; and the court, on that occasion, distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same

doctrine was fully recognized in *Haigh v. Brooks*, 10 Adol. & El. 309, and in *Mayer v. Isaac*, 6 Mees. & Wels. 605, and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this court acted in *Lee v. Dick*, 10 Peters, 482, and in *Mauran v. Bullus*, 16 Peters, 528. Indeed, if the language used be ambiguous, and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury."

It is accordingly well settled that a guaranty should, like other instruments, receive a liberal interpretation in aid of the intention of the parties; *Gates v. McKee*, 3 Kernan, 232; *Dobbins v. Bradley*, 17 Wend. 422; and may be construed as continuing whenever its own terms or the previous course of dealing indicate that it was meant to extend to subsequent sales or advances. *Wood v. Prelstner*, 2 Exchequer L. R. 66, 282; *Bent v. Hartshorne*, 1 Metcalf, 24; *Hatcher v. Hobbs*, 12 Gray, 447; *Rudge v. Judson*, 24 N. Y. 74; *Gates v. McKee*.

A guaranty of such loans as the principal shall effect, or of any goods that he may buy, may accordingly cover successive sales or advances made on the faith of the credit given by the guarantor. *Merle v. Wells*, 2 Campbell, 413; *Mason v. Pritchard*, Ib. 436; 12 East, 227; *Mayer v. Isaac*, 6 M. & W. 675. And this construction was put on the *Agawam Bank v. Shriver*, 18 N. Y. 502, on a promise to be answerable for all liabilities incurred by a third person, on proof that no liability existed at the time, and that the parties must, therefore, necessarily have looked to subsequent transactions. This decision affords a good example of the rule that the attendant facts and circumstances may be called in aid of ambiguous words and phrases, or even to show that language *prima facie* relating to a past transaction, had a future signification. *Haigh v. Brooks*, 10 A. & E. 309; *Goldshede v. Swan*, 1 Excheq. 54; *Aldridge v. Eshleman*, 10 Wright, 420; *Stoneleigh v. Miles*, 36 Mississippi, 434. In like manner, when the terms of a guaranty admit of two interpretations, recourse may be had to the acts and declarations of the parties, for the purpose of ascertaining the sense in which it was understood at the time or interpreted subsequently; and in the *Michigan Bank v. Peek*, 2 Williams, 200, evidence that the defendant had repaid a loan which he did not owe, agreeably to argument made on his behalf by counsel, was held to justify the conclusion that he was answerable for another of a like kind.

It is, however, equally well settled that as the liability of a guarantor arises solely from the contract, he will not be answerable unless it is strictly pursued. *The Merchants' Bank v. Heard*, 5 Cush. 461; *Hunt v.*

*Smith*, 17 Wend. 479; *Bigelow v. Benton*, 14 Barb. 123; *Myers v. Parker*, 6 Ohio N. S. 501; see note to *The United States v. Howel* (post). Hence a guaranty of a bill at three months, will not cover a bill drawn at four months, or even at two, and no recovery can be had on a letter of credit unless the advances are made in the way prescribed; See *The Ulster Co. Bank v. McFarlan*, 5 Hill, 432; *Birkhead v. Brown*, Id. 634; *Walrath v. Thompson*, 6 Id. 540; *Dobbins v. Bradley*, 17 Wend. 422; although this is not a reason for excluding anything from the operation of the promise which comes fairly within it, or for refusing to interpret it with the liberality which is essential to the purpose of justice, *Birney v. Newcome*, 9 Cushing, 46; *Bell v. Bruen*, 1 How. 169; *Lawrence v. McCalmont*, 2 Id. 426; *Bayer v. Isaac*, 6 M. & W. 685. The chief difficulty lies in determining what interpretation should be put on a guaranty which is so worded that it may either extend to a series of sales or advances, or be limited to the first. The better opinion would seem to be, that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad, to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits. The tendency of decision in this country, has accordingly been against construing guarantees as continuing, unless the intention of the parties is so clearly manifested, as not to admit of a reasonable doubt. *Congdon v. Read*, 7 Rhode Island, 576; *Gold v. Stevens*, 12 Mich. 292; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Webb v. Dickerson*, 11 Id. 62; *Aldrichs v. Higgins*, 16 S. & R. 213; *Anderson v. Blakely*, 2 W. & S. 237. Nice distinctions have sometimes been allowed to turn the scale, and it has been said that as a parol guaranty is susceptible of being recalled, it may more reasonably be held to be continuing, than an instrument under seal which binds the guarantor irrevocably, notwithstanding the failing circumstances or misconduct of the principal, Addison on Contracts, 667, 668; but this argument is not admissible, except in a doubtful case where there is no other clue to the meaning of the contract. *Ten Eyck v. Vanderpoel*, 8 Johnson, 120; *Aldriche v. Higgins*; *Anderson v. Blakely*.

## ANTECEDENT DEBT.—CONSIDERATION.

PHILIP VADIKIN, DEFENDANT BELOW, v. HENRY SOPER,  
PLAINTIFF BELOW, IN ERROR.

In the Supreme Court of Vermont.

JANUARY, 1826.

[REPORTED, 1 AIKENS, 287-289.]

*An indebtedness to three jointly, is not a sufficient consideration, to support a promise to one separately, for his portion of the debt, either express or implied.*

*Defects in a declaration merely formal, are cured by verdict, and so are many which would be reached by a general demurrer.*

*The omission of that which must necessarily be presumed to have been proved on trial, is not cause of arrest.*

*But, nothing is presumed to have been shown, but what is expressly stated, or necessarily implied from facts which are stated.*

*There can be no presumption from the fact that a promise was proved, for which no consideration (or an insufficient one) is alleged, that a consideration was proved, or that any other consideration was proved than that which is stated.*

THE defendant below was attached to answer to the said Henry Soper, in a plea of the case, for this, to wit, that whereas at said Bristol, on the 8th day of July, 1820, the defendant was indebted to the plaintiff, and one Enos Soper and Uriah F. Arnold, in the sum of \$81.14, as the balance due them as the consideration of the purchase before that time made by the said Philip, of the said plaintiff, Enos and Uriah, of a certain piece or parcel of land in said Bristol, as also the privilege of drawing water from the pond of the mill, called the Stone mill, in said Bristol, then the property of the plaintiff, said Enos and Uriah, sufficient to carry a fulling mill; and afterwards, to wit, at said Bristol, on the day and year last aforesaid, in consideration thereof, assumed upon himself, and to the plaintiff faithfully promised to pay him, his, the plaintiff's share or third part of said debt, to

wit, the sum of \$27.04, when he the defendant should be thereto afterwards requested: yet, &c.

Plea, *non assumpsit*, and verdict for the plaintiff; whereupon this writ of error was brought, and the following errors were assigned.

1. That the declaration aforesaid, and the matters therein contained, are not sufficient in law, for the said *Henry*, to have and maintain his aforesaid action thereof, against the said *Philip*.

2. The *common error*.

*Chipman*, for the plaintiff in error. The declaration in this case, is *indebitatus assumpsit*. The indebtedness stated is to three, and could only raise a promise to the three, not to one.

There is no consideration for the promise to pay the plaintiff his third part. It is a settled principle, that a promise to pay an existing debt, is *nudum pactum*, and void, unless the prior debt be discharged, or the right of action on it suspended.—1 Dane, Chap. 1, Ar. 41, sec. 3.

In this case, the right of action in favor of the three, was neither discharged nor suspended by the alleged promise.

But one joint creditor, separately, can maintain no action against the debtor, either for his part, or for the whole.

*Bates*, for the defendant in error, contended, that this defect is cured by the verdict.

One distinction as to what defects are or are not cured by verdict has been well stated as follows. The total omission of any material fact which is no way connected with any fact alleged is not aided by verdict. But when material facts are entirely omitted, if they are necessary concomitants of any material facts alleged in the declaration, so that in finding the facts alleged, the jury must necessarily have found the facts omitted, the defect is cured by the verdict. [1 Day's Cases, 186, note.—1 Term Rep. 145, *Spiers v. Parker*, Buller's opinion.—Cowp. 827, *Avery v. Hoole*.] Now in this case, the jury never could or would have found the facts that the defendant made this sole promise in consideration of the joint debt, according to the allegations in the declaration, unless they were satisfied by the proof that the joint debt was discharged.

Indeed, evidence that one joint debtor offered to become a sole debtor for his share, and that the creditor accepted the offer, is in

itself evidence that the joint debt was discharged, and these facts the jury must have found in order to support the declaration.

The opinion of the court was delivered by

SKINNER, Ch. J. The ground upon which the plaintiff in error relies for reversing the judgment, is the insufficiency of the declaration, in this, that there is no consideration alleged to support the promise declared upon. The consideration upon which the plaintiff below avers the promise to have been made, is a pre-existing debt, due from the defendant to the plaintiff and two other persons jointly, for certain lands and water-privileges, purchased of them for the defendant: the balance of debt then due, he avers to be eighty-one dollars and fourteen cents, of which he claims the one-third, viz., twenty-seven dollars, four cents. There is nothing in the record from which it may be determined whether the plaintiff below relied upon an express or implied promise. The declaration is correctly framed for either, and from the view taken of the case, it is immaterial, for we believe the facts stated are not sufficient to subject the defendant, upon an undertaking express or implied. This is not a promise in consideration of *forbearance*, nor is it a promise in consideration of a *discharge* or *release* of the joint demand, or any part thereof. It does not appear to have been founded upon anything *beneficial* to the defendant, or *prejudicial* to the plaintiff; and indeed there is nothing in the declaration that shows a *mutual* agreement of the parties, or any promise to which the plaintiff assented, or upon which he was bound to rely. There are no *facts* stated in this declaration that would constitute any defence to a joint action upon the joint demand; and if a recovery could be had in such action, surely none can be had in this. If the party was permitted here to recover the sum claimed, he must yet join the other creditors in a suit for the balance. But the ground upon which the plaintiff below principally relies in the case is, that the defect is cured by verdict. Defects merely formal or aided by verdict, and many defects which would be reached by general demurrer, are also cured by verdict. The omission of that which must necessarily be presumed to have been proved on trial, is not cause of arrest; but nothing is presumed to have been shown, but what is expressly stated in the declaration, or necessarily implied from those facts which are stated.\* There can be no presumption that

\* See 1 Smith's Leading Cases, 926-934, 6th Am. ed.



in proving a *promise*, for which no consideration is alleged, that a consideration was proved, or that any other consideration was proved than that which is stated. 1 Salk. 364.

Judgment, therefore, must be reversed, &c.

*Horatio Needham* and *Daniel Chipman*, for the plaintiff in error.

*Jos. C. Bradley* and *R. B. Bates*, for the defendant in error.

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COMPTON v. JONES.

In the Supreme Court of New York.

FEBRUARY TERM, 1825.

[REPORTED, 4 COWEN, 13-14.]

*The Assignment of a debt, with notice to the debtor, creates an equitable obligation in favor of the assignee, which will support an express promise for the payment of the debt to him.*

\*IN this case there was a general demurrer to the declaration, which set forth, that on the 4th day of February, 1823, the defendant made his certain deed, &c., and delivered the same to one S. T. Wood, by which he, for value received, promised to pay Wood or bearer \$500, in four equal annual instalments from the date; that Wood afterwards assigned and transferred the deed, to the plaintiff, for a valuable consideration, and thereby constituted him the bearer thereof, and authorized and directed him to demand and receive of the defendant, the amount due on its face, for his own benefit; that the plaintiff afterwards gave notice to the defendant of the assignment; and that in consideration of the premises, and that the plaintiff would accept and agree to the defendant's promise, the defendant promised the plaintiff to pay him the money mentioned in the deed with an averment, that \$250 fell due before the commencement of the suit.

*C. M. Lee*, in support of the demurrer, relied on what this court said in *Andrews v. Montgomery* (19 John. Rep. 162, 165), viz.: that assumpsit cannot be supported where there has been an express

\* The syllabus and statement of the reporter are omitted.

contract, under seal; but the party must proceed in debt or covenant.

*Z. A. Leland*, contra, cited *Fenner v. Meares* (2 Bl. Rep. 1269), and Cowen's Treatise, 35.

SAVAGE, Ch. J., remarked, that what was said by the court in the authority cited by the defendant's counsel, was intended of a case where the action was brought by the party to the specialty. And the whole court were clear, that the action was sustainable, being on a promise to the assignee. Judgment for the plaintiff.

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## DEPEAU AGAINST WADDINGTON AND OTHERS.

IN ERROR.

In the Supreme Court of Pennsylvania.

FEBRUARY 8, 1841.

[REPORTED, 6 WHARTON, 220-236.]

*Although the taking of the note of a third person as collateral security for a pre-existing debt, without more, will not place the taker in the situation of a holder for value, so as to protect him against the equities subsisting between the original parties in the note; yet it is otherwise if there is a new and distinct consideration—as if time was given in consideration of obtaining the note as security for the debt, &c.*

*The plaintiffs, who were creditors of A. to the amount of \$1,500, held as security for the debt a bond given by a third person to A. for about \$2,400. A. applied to them, for the bond, alleging that he had an opportunity of getting the money upon it, and would with the proceeds pay the amount of his debt due to them. The bond was delivered to A. upon this understanding. A few days after this A. paid the plaintiffs \$800 in cash, and gave them a note drawn by the defendant in his favor for \$983, as security for the balance. Held, that under these circumstances the note of the defendant was taken upon a sufficient consideration, and therefore that the plaintiffs were entitled to recover against the defendant, although there was no consideration between him and A.*

ERROR to the District Court for the City and County of Philadelphia.

Assumpsit by Charles Waddington, Robert S. Robb, and David Ogden, partners, under the firm of Ogden, Waddington & Co., against Francis A. Depeau, upon a promissory note, dated New York, January 5th, 1836, made by the defendant in favor of Robinson and Smith, and endorsed by them at four months, for \$983.20.

On the trial, before PETTIT (Pres't), on the 31st of October, 1839, the plaintiffs gave in evidence the note and a protest thereof.

The defendants then gave in evidence the depositions of J. W. Waring and Sylvester Robinson, Jr., taken at New York, under different commissions there.

In answer to the second interrogatory on the part of the defendant, J. W. Waring testified as follows: "I have some knowledge of the note inquired of in this interrogatory; I was not present at the delivery or making of the said note. Mr. Depeau had given this note to Mr. Robinson for the purpose of getting the note discounted; Mr. Robinson then took this note instead of getting it discounted; and left it as security with Ogden, Waddington & Co., the plaintiffs, for what Robinson & Smith owed them. Mr. Ogden called or sent repeatedly to the store of Robinson, Waring & Co., and the reply from Mr. Robinson was, to Mr. Ogden, that Mr. Depeau had given him this note for goods purchased from Robinson, Waring & Co., or Robinson & Smith, which was the firm previous to my going into it. Mr. Depeau had frequently asked Mr. Robinson what had become of this note. Mr. Robinson replied to Mr. Depeau, that he had torn it up; after Mr. Depeau finding it was not consumed or torn up, Mr. Robinson, then replied to him, that he would settle with Ogden, Waddington & Co., and he need not give himself any further uneasiness; all this occurred in my presence."

To the third interrogatory on the part of the defendant, he answered: "I know this note was offered for discount at the Bank of America and refused; it was offered by Robinson & Smith; the account in the bank was kept by Robinson & Smith; the note was endorsed by them, and also by Robinson, Waring & Co. I have

already answered, under the previous interrogatory, all my knowledge in relation to the representations herein mentioned. I don't know that the defendant received any value for the said note from Robinson & Smith, or either of them."

To the fourth interrogatory on the part of the defendant, he answered: "I know the plaintiffs loaned to Robinson & Smith about 'the sum of fifteen hundred dollars; I believe it was just that sum; I don't recollect what time the loan was made; it was previous to my going into the concern; I joined the concern in the middle of January, 1836. The plaintiffs had as security a bond made by Edward G. Miller to Thomas M. Smith, one of the partners of Robinson and Smith; I think it was for twenty-three or twenty-four hundred dollars, or twenty odd hundred dollars; I cannot tell exactly the amount. Robinson & Smith repaid a part of this, somewhere about eight hundred dollars, I think; I don't recollect what time this was paid; the bond was taken away. Mr. Robinson told Mr. Ogden, or some one of the partners, that he wanted to take this bond away, as he wanted to get it discounted; I was with Mr. Smith myself at the time. I went down with him to the plaintiffs; the bond was given up and I got it discounted, the note in question was left with the plaintiffs as security for the balance; this I know of my own knowledge; the note was not left to be discounted by them, but as a security for the balance of the loan." "

To the fifth interrogatory on the part of the defendant, he answered: "I have nothing more to say than that the note was left as security until the balance was paid; they did not give any new credit or make any new advances."

Sylvester Robinson, Jr., in answer to the defendant's second interrogatory, testified, that he had knowledge of the note mentioned and described in this interrogatory; that he was present at the making and delivery of the note; that the note was made and delivered to Robinson & Smith (the deponent's then firm) for the purpose of being discounted through the deponent's firm for Depeau's accommodation and use; that the deponent's firm had no dealings whatever with Depeau; and no consideration whatever was given by them for the note; that they were to get it discounted for him merely to accommodate him, being acquaintances and friends of his.

To the third interrogatory he answered, that his firm were indebted in about the sum of fifteen hundred dollars to the plaintiffs. "The deponent is not positive of the amount, but thinks it was \$1500, or near that. The deponent's said firm gave them a bond of Edward H. Miller to secure the same. That he cannot recollect the time when the said bond was so given to them, but he thinks it was in the month of January or February, 1836; that a part of the said sum was repaid to the plaintiffs some time in the spring of 1836; he thinks in or about April, but cannot recollect the time more particularly. The amount so paid was about \$700, as near as the deponent can remember. That the said bond was delivered to the deponent's firm on the payment of such part of the said \$1500, upon the understanding that the deponent's firm would immediately pay them (the plaintiffs) the balance of the said amount due them. The object of the deponent's firm in getting the said bond was to get the same discounted and pay the said plaintiffs at once; the bond being for a considerably larger amount than the sum due the plaintiffs. The deponent does not recollect whether the plaintiffs afterwards asked his firm for other security, although they may have done so; he thinks the note in question was, a few days after the said bond was so delivered up by the plaintiffs, proffered to them as collateral security, for the balance due them; the deponent's firm did, as first stated, hand over the said note to the plaintiffs after they had secured the said bond; it was about a week after the said bond was so delivered up, that the said note was handed to the plaintiffs, as near as the deponent can recollect; it was, at any rate, a few days after it was so delivered as above stated, to secure the plaintiffs the balance of the said sum so due them and for which the said bond had been held by them as collateral security, that no other or new consideration was given by the plaintiffs for the said date."

To the first cross-interrogatory, he answered, that his firm did endorse the note, and did so at that time, or soon after he received it.

To the second cross-interrogatory, he answered, that the understanding between the plaintiffs' and the deponent's firm, at the time the bond was so delivered up, was as stated in the answer to the direct interrogatories, that the deponent's firm should pay the plaintiffs immediately, the balance due them; it being stated and understood, that the deponent's firm was to get the bond discounted

at once for that purpose; that nothing whatever was stipulated or spoken of at the time the bond was so given up, about other security in the place of the bond; for the reason, that the balance was to be paid in cash, as before stated.

To the third cross-interrogatory, he answered, that it was not understood, that the plaintiffs should not proceed for the recovery of the balance due them, until the maturity of the note; that nothing of the kind was spoken of or contemplated, as the balance was to be paid in cash, immediately, as already repeatedly stated.

The defendant here closed his case.

The plaintiffs then gave in evidence the deposition of William P. Wright, taken under a commission to New York, who testified in answer to the second interrogatory, that he was in the employment of the plaintiffs for upwards of two years, as book-keeper, and left their employment on or about the 30th of April, 1836.

To the third interrogatory, he answered, "the plaintiffs held a note of Robinson & Smith, for \$1500, due in January, 1836; they received a bond for about \$2500 as security for the payment of the said note. The note was protested, and one of the firm came down to the office of the plaintiffs and stated, that if the plaintiffs would lend him the said bond for a day, he had an opportunity of getting the money upon it, and he would then pay the said \$1500 note. The said purpose was not fulfilled by taking up or paying the said note, and the said bond was never returned to the plaintiffs to my knowledge. They got some time afterwards, how soon I don't know, \$800 in cash, and a note of the defendant, Depeau, in lieu of the said bond. As already stated, the said bond was given up to one of the said firm of Robinson & Smith, and was never returned; and the plaintiffs relinquished their claim upon the bond, upon receiving the said \$800 and the defendant's note, as first stated." This took place before the deponent left the employment of the plaintiffs, but when, he did not recollect.

To the fourth interrogatory, he answered, that he knew nothing of the note inquired of in this interrogatory (viz., the note in suit). He only knew as stated in answer to the last preceding interrogatory, that a note of the defendant was taken as therein stated, and which, with the \$800 in cash, was given in lieu of the bond.

To the first cross-interrogatory on the part of the defendant, the witness answered, that "he was present when the bond was given up, and he merely recollects that it was given up for the purpose of getting it discounted to take up the said note for \$1500. The sum of \$800 was paid after the delivery of the bond, and not at the time it was given up; Robinson & Smith did not agree to pay any balance, when the bond was so delivered up; but as stated in answer to the direct interrogatories, it was given up to be discounted, and the note for \$1500 was to be paid out of the proceeds forthwith. This was not done; but subsequently the sum of \$800 was paid; and either then, or after the time the \$800 was paid, Robinson & Smith gave the note of the defendant in lieu of the bond. The bond was never returned to the plaintiffs, as already stated." After the bond was so delivered up, the witness went down to Robinson & Smith's frequently, to get the amount of the \$1500 note, but was never able to see either of them. The note in question, and the \$800 were given after the bond had been delivered to Robinson & Smith, in lieu of the bond, and as collateral security for the note of \$1500. "The deponent does not recollect how long after the bond was surrendered, that the note was received by the plaintiffs. The plaintiffs gave up their claim upon the said bond, for the note and the \$800."

To the third cross-interrogatory, he answered that, "the plaintiffs got Robinson & Smith's note in the course of business, but how he does not know, or for what it was given; he speaks of the \$1500 note."

The evidence on both sides having been closed, the defendant's counsel made the following points on which they requested the charge of the court:—

"1. If the jury believe that the note was improperly put in circulation by Robinson & Smith, it is incumbent on the plaintiffs to show that they paid value, parted with property, or gave credit on the faith of the note, at the time of the transfer to them.

2. That the taking of the note as collateral security, for the payment of pre-existing debt, is not a taking of it in the ordinary course of trade, and for a valuable consideration between the parties to this suit.

3. That the taking of the note in payment of a precedent debt, is not such a consideration, as creates a superior equity in the plaintiffs to that previously existing between the original parties.

4. If the jury believe that the plaintiffs gave up the bond to Robinson & Smith, at their request, for the purpose of having it discounted or sold, and on their promise to pay the plaintiffs the amount of their debt due to them, out of the proceeds of the sale, they parted with their claim, property and title to the bond, by parting with its possession for the purpose of a sale; and if the note was subsequently transferred to the plaintiffs by Robinson & Smith, after the sale of the bond, as security for the amount due to them, the plaintiffs paid no value for the note and cannot recover, if the jury are of opinion that the note was originally without consideration.

5. That as the note was made at New York, the law of that State must govern the contract.”

The following points were made by the plaintiffs’ counsel:—

“1. The act of the plaintiffs in entrusting the bond to Robinson & Smith (or the member of their firm to whom it was made payable,) that he might discount or dispose of it, for the use of the plaintiffs themselves, was not such a parting with the possession of the bond, as would change or divert the property which the plaintiffs had previously had in it, as a security for the money lent by them to Robinson & Smith.

2. Under such circumstances, Robinson & Smith would not receive it as debtors to whom a security is surrendered by their creditor, but as agents or trustees for the plaintiffs, in the same manner as strangers, who had received it under such circumstances, and for such a purpose.

3. If the bond was disposed of by Robinson & Smith, and the proceeds received by them, such proceeds would, in their hands, be subject to the same ownership and trust, as the bond for which they were the substitute. The right of the plaintiffs to the proceeds would not be a mere pecuniary claim or debt of Robinson & Smith, but a specific interest and property of the plaintiffs in the proceeds themselves.



4. If Robinson & Smith had disposed of the bond, before the transfer to the plaintiffs of the note in question, there is no evidence that they had at that time parted with the proceeds of the bond; and in the absence of any such evidence, the legal presumption is that they still retained the possession of so much of the said proceeds as belonged specifically to the plaintiffs.

5. The plaintiffs' portion of the proceeds of the bond when disposed of, was in the hands of Robinson & Smith, a specific security belonging to the plaintiffs, to such an extent as the bond had previously belonged to them.

6. The giving up of their claim to the bond, if it took place in the manner testified to by Mr. Wright, or in the words used by him, was in legal effect the same thing as giving up their specific interest in the proceeds of the bond.

7. If this receipt by the plaintiffs of the note in question, constituted the consideration or a part of the consideration for the surrender by them of their then existing interest in the bond, or in the proceeds of the bond, this amounted to an exchange of the one security for the other, and the note thus received in lieu of the security of the bond, then for the first time surrendered, was received for a valuable consideration, given on the credit of the note itself, and the defence on this point fails.

8. Under the last point, the case would not be affected by the circumstance of the possession of the bond having been previously parted with by the plaintiffs, if they only parted with it for the purpose of its being discounted, by the parties to whose possession it was entrusted, nor would the case be affected by the circumstance that the bond had actually been discounted or disposed of, and converted into money before that time.

9. Under these circumstances stated by Waring, at the conclusion of his answers to the second interrogatory in chief, it was the duty of the defendant, if he meant to contest his liability to the plaintiffs on this note, to give them notice of his intention so to do, and he incurred a similar obligation when the note was exhibited to him by the notary, with the plaintiffs' endorsement upon it. If the defendant did not give the plaintiffs such notice, within a reasonable period after the occurrence of the earliest in

point of time of these circumstances, but suffered the plaintiff's to remain in the belief that he was liable on the note till this action was brought, it is against law and equity that he should now insist upon the present matter of defence.

10. The burthen of proof of such notice is on the defendant, and in the absence of such proof the presumption is that none was given."

The learned judge charged the jury in substance, as follows:—

"The plaintiffs claim the balance of \$700 with interest, for which they say this note was pledged to them. The defendant has shown what would undoubtedly defeat any claim upon this note, on the part of Robinson and Smith, from whom the plaintiffs received it. This has put the plaintiffs on the proof of the manner in which they got the note; and on the proof under this head, the case will depend. Robinson and Smith owed the plaintiffs \$1500 for money lent. They held a bond of one Miller, as a collateral security for this debt. This bond they say they gave to Robinson and Smith, for a particular purpose, viz., that of getting it discounted, and their debt paid out of the proceeds; and that Robinson and Smith, having thus received the bond, did not either return them the bond, or pay them the proceeds of it. They say they never gave up their claim to this bond, or the proceeds of it, until they received from Robinson and Smith \$800, and the note of the defendant now in suit; and, that on receiving the \$800 and note, they did surrender it. The defendant, on the other hand, says, that when the plaintiffs first parted with the possession of the bond to Robinson and Smith, they gave up their right to it, that is to say, surrendered it, both as to property and possession; and he then puts the case on the ground that the subsequent receipt of the note was merely as a security for the previous debt, or the balance of it. Now, if the plaintiffs did take this note, merely as a collateral security for a pre-existing debt, without more, the law would be in favor of the defendant on this point. If, however, a debt is given up or a security parted with; if any security is surrendered in consideration of receiving a note; the consideration is sufficient to give a property in the note to the party receiving it." This part of the case was left to the jury. The judge then said, "If you adopt the latter view of the case, I charge you, that parting with a security at the time of receiv-

ing the note is a sufficient consideration to remove the objection which the defendant has taken to the plaintiffs' recovery. A previous temporary parting with the mere possession of the bond for the particular purpose of having it discounted, for the plaintiffs' use, would not constitute a parting with the plaintiffs' property, in their portion of the proceeds of it, when disposed of, so as to render it impossible for them afterwards to surrender their property in it, in consideration, or part consideration, of the receipt of this note. If the jury think the bond was only loaned to Robinson and Smith, for a particular purpose, such lending did not divest the plaintiffs' property in the bond, or in the proceeds of it. If the bond was discounted, and the money raised upon it, the plaintiffs had a specific interest in the proceeds, as they before had in the bond. A mere parting with the possession of the bond does not necessarily imply that the plaintiffs intended to give up their claim to it. If, however, when the bond was first handed over to Robinson and Smith, the plaintiffs really surrendered all their rights in it, then the defence is sustained. If, on the contrary, the parting with the possession of the bond was merely for the particular purpose of having it discounted, and the proceeds paid over to themselves, the parting with the possession of it was no surrender of their property in it, or in the proceeds, after it should be disposed of."

The judge then said that he had answered all the points except the ninth; that he did not think this had any important bearing on the cause; but while he declined answering it as proposed, he would remark, that if the defendant slept upon the knowledge that the plaintiffs held the note in question, and did not immediately give them notice that he had received no value for the note, it would be a circumstance for the consideration of the jury, in reference to the defendant's liability.

The jury found for the plaintiff, and this writ of error was taken, and the following errors assigned.

"1. Because the judge erred in charging the jury that a parting with the possession of the bond for the purpose of a sale of it, was no surrender of the property in it; and the parting with the possession did not imply that the plaintiffs intended to give up their claim to it.

2. Because the judge erred in charging, that if the defendant

slept upon the knowledge that the plaintiffs held the note, and did not immediately give them notice that no value had been received for it, it was a circumstance for the consideration of the jury, in reference to his liability."

Mr. *Norris* for the plaintiffs in error.

1. The learned judge below erred in saying that the plaintiffs did not surrender the property in the bond, by parting with the possession of it under the circumstances. The plaintiffs could not have brought trover, or any other action, for the bond, while it was in the hands of a third person, who had given value for it. 1 Bos. & Pul. 546. In New York, a bond passes by delivery like a bill of exchange. Delivery is necessary to part with the property in a bill, bond, &c. *The King v. Lambton* (5 Price, 442; 2 Eng. Exch. Rep. 276). The property in an exchequer bill passes by delivery only. *Wookey v. Pole* (4 Barn. & Ald, 1; 6 Eng. Com. Law Rep. 323). The King of Prussia's bonds were held to pass by delivery only, in *Gorgier v. Melville* (3 Barn. & Cresw. 45; 10 Eng. Com. Law Rep. 16). *Hornblower v. Proud* (2 Barn. & Ald. 327).

2. The defendant was not bound to prove notice. If the plaintiffs gave no consideration, they cannot be in a better situation than the party from whom they got the note.

3. This note was not received in the regular course of business, and therefore the defence was available. In *Coddington v. Bay* (20 Johns. 651), C. J. SPENCER says, "I understand by the usual course of trade not that the holder shall receive the bills or notes as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time." To bring the transaction within the rule laid down in other cases, the surrender of the bond and receipt of the note ought to have been made simultaneous. There must be a present consideration. *Payne v. Cutler* (13 Wend. 606). There must be an advance of money, or debt contracted, or liability incurred at the time. Here the delivery of the bond was a week prior to getting the note. *Smith v. Van Loan* (16 Wend. 661), repeats the doctrine that value must be paid, or property parted with, or credit given, on the faith of the note at the time of the security. Taking in payment of a precedent debt would not create a greater equity than that subsisting between the original parties. *Petrie v. Clark* (11

Serg. & Rawle, 388). *Wardell v. Howell* (9 Wend. 170). *Rosa v. Brotherton* (10 Wend. 85). Here the plaintiffs are not in a worse situation, if the defence prevails, than they were after parting with the bond.

Mr. *Biddle* and Mr. *Cadwalader* for the defendants in error.

The doctrine contended for on the other side is, that, by giving up the bond, the plaintiffs gave up their right to the proceeds of it. But the jury have found that they did not. Robinson got the bond as their factor or servant. We don't deny that the plaintiffs could not claim the bond from a bona fide purchaser; but we contend that they had a specific lien on the proceeds. It is a case of exchange of securities. The plaintiffs gave up the bond (or what is the same thing, their claim to the proceeds of it), for the note. In *Taylor v. Plumer* (3 Maule & Selwyn, 562) it was held that a creditor was entitled to follow stock and bullion, which his broker had got with the creditor's money, instead of exchequer bills. *Coddington v. Bay* (20 Johns. 639), *Wolf v. Eichelberger* (2 Penn. Rep. 348), and *Petrie v. Clark* (11 Serg. & Rawle, 388), all show that parting with a security forms a valuable consideration. So is giving time. Our law is the same as that in England and New York. *Walker v. Geisse* (4 Wharton, 258). *Smith v. Van Loan* (16 Wend. 661), in effect overrules *Rosa v. Brotherton* (10 Wend. 85). In *Morton v. Rogers* (14 Wend. 575), two judges expressly dissented from the doctrine in *Rosa v. Brotherton*.

Mr. *Haly* in reply.

The money obtained on the bond had no ear-mark. It was undistinguishable from other money of Robinson. The burden of proving that the bond was converted into specific property, lies on the other side. The case of *Taylor v. Plumer* makes the distinction expressly between money in specie and money merged in other money. Here no security was parted with on the faith of the note. What is called on the other side "the proceeds of the bond," was a mere right of action against Robinson for a breach of trust; if there was any trust in the case. The plaintiffs neither released the debt nor gave time.

The opinion of the court was delivered by

ROGERS, J. This was an action of assumpsit on a promissory note, drawn by the defendant, Depeau, in favor of Robinson & Smith, or order, and by them endorsed to the plaintiff. The plaintiffs lent Robinson & Smith fifteen hundred dollars on a note; and as a collateral security, the latter firm placed in the hands of the former a bond for twenty-three or twenty-four hundred dollars, of a certain Edward Miller to Thomas S. Smith, one of the partners of Robinson & Smith. Some time after, Robinson called on the plaintiffs, and stated that he wanted to take the bond away, and to get it discounted. Robinson & Smith, a week or so after the delivery of the bond, paid to Ogden & Co., eight hundred dollars, and transferred the note in suit to them as collateral security for the amount yet remaining due. The plaintiffs gave up their claim upon the bond, for the note and the eight hundred dollars. It seems that the note of Robinson & Smith to the plaintiffs was protested; that one of that firm came to the plaintiffs, and stated that if they would lend him the bond for a day, he had an opportunity of getting the money upon it, and would then pay the fifteen hundred dollars. The bond was delivered to him for that purpose; but the bond was neither delivered to the plaintiffs, nor was the amount due on the note paid according to the understanding between them; but some time afterwards—how soon is not recollected, nor is it material—eight hundred dollars in cash were paid, and the note in suit was transferred to the plaintiffs, in lieu of the bond, and as a collateral security for the note. It may be inferred from the evidence, although no direct proof is given of it, that the bond was assigned for a valuable consideration, or paid by the obligor; that the money was received by Smith, one of the obligees; and that eight hundred dollars were paid of the proceeds. Robinson, of the house of Robinson & Smith, says, that the bond was delivered to the deponent's firm on payment of part of the fifteen hundred dollars, upon the understanding, that the deponents would immediately pay them the balance of the amount due; that the object of the firm in getting the bond was to have it discounted, and pay the plaintiffs at once; the bond being for a considerably larger sum than was due. He does not recollect whether the plaintiffs afterwards asked his firm for other security, although they may have done so. He thinks the note in suit was, a few days after the bond was delivered up

by the plaintiffs, proffered to them, as collateral security for the balance due. They handed over the note about a week after the bond was delivered up, but after they had secured the bond; that is, as I understand it, after they had received the money for it. No other, or new consideration was given by the plaintiffs for the note. The understanding was, that the deponent's firm was to pay the plaintiffs immediately the balance due them; that the bond was to be discounted at once for that purpose. Nothing was stipulated about the security, because the balance was to be immediately paid in cash. The note in suit was given for the purpose of being discounted for the sole accommodation of Depeau.

The defendant alleges that there was no consideration for the note in suit; that the transfer of it to the plaintiffs was in fraud of his rights; that it was placed in the hands of the plaintiffs as collateral security, and that consequently there is the same equity existing as between the maker and payee. The plaintiffs admit that there was no consideration between the original parties; that the payee could not recover, and that if pledged as a collateral security, without more, for a pre-existing debt, they would be in no better situation than the first holder; but they contend that there was an exchange of securities in substitution of the note for the bond, or the proceeds of the bond, and that they were innocent holders for value.

Several exceptions have been taken to the charge of the court, none of which have been sustained. The charge is clear and precise, and substantially answers all the points which were made, and is as favorable to the defendant as he had any right to expect. The court leave the facts to the jury, and if there be any error, it is the application of the evidence to the points ruled. In the investigation of the case it becomes material to ascertain what are the facts found by the jury, and to which their attention was directed by the court. They are, in substance, these. That placing the bond in the hands of Robinson & Smith, who acted as the agent of the plaintiffs, was for a particular and special purpose, viz., that they would immediately dispose of the bond; which they did; and that they would pay over a portion of the money to them; and that in the meanwhile, the proceeds would be held by them as a pledge or security for the amount due on the note; that the money raised by the sale or payment of the bond was a substitute for the bond; that as the bond was a collateral security, so was the money arising therefrom. That

at the time they stood in the relation of principal and agent, the parties came to an arrangement, and in consideration that the plaintiffs would relinquish all claim to the money, whether lien or otherwise, they agreed to transfer, in lieu of the bond or the proceeds thereof (which the jury have found to be the same thing), the note now in suit, as a collateral security for the original debt. The only question, therefore, is, are the plaintiffs innocent holders for value. As between the maker and payee, it is granted, there was no consideration, and the failure and absence of this would be a good defence to the maker. But between other parties, as here between the plaintiff and defendant, two distinct considerations come in question; first, that which the defendant received for his liability; and, secondly, that which the plaintiffs gave for their title. If the defendant can show that he has an equity not to be charged, as if he can prove, as has been done here, that he received no consideration for his liability, or that his signature was obtained by force or fraud, he may, after giving due notice, require the plaintiff to show that he gave a valuable consideration for the note or bill, and that the plaintiff has no equity to recover. But actions between remote parties will not fail unless in case of absence or failure of both these considerations. It is conceded here, that as between the maker and payee, there is no consideration whatever; that the plaintiffs are required to prove that they gave a valuable consideration for the note, and that if the note is held merely as a collateral security for a pre-existing debt, without more, it is not such a consideration as will prevent the defendant from availing himself of the equity as between the maker and payee. In *Rosa v. Brotherton* (10 Wend. 85), it is decided, that when the creditor receives the transfer of a negotiable note, in payment of a pre-existing debt, he takes it, although transferred to him before maturity, subject to all existing equities between the original parties. But that case was not well considered, and has been subsequently overruled. But although this is so, it has been repeatedly held that a collateral security for a pre-existing debt, without more, is not such a consideration as will give title to the holder; yet, if there is a new and distinct consideration, the holder is a purchaser for value, and, as such, protected from a defence which would have been available between the original parties. It seems to me there would be no great difficulty in proving that it would have been better not to have restrained the negotiability of paper *bona fide* pledged as a



collateral security for a debt ; but on this point the law is settled. Without making a parade of learning and research by the citation of numerous authorities, foreign and domestic, ancient and modern, it is sufficient to refer to *Petrie v. Clark* (11 Serg. & Rawle, 377,) where both points are ruled. It is there held that the transfer of negotiable paper as collateral security for a pre-existing debt, does not constitute a person a holder for a valuable consideration. But where there is a new consideration, as where it can be shown that time was given in consideration of obtaining the note as a security for the debt, it would be otherwise. The court, after stating the general principle adverted to, add, that it might be shown on the other side that the plaintiffs had a right to recover, provided they were able to prove that time was given in consideration of obtaining the note as security for the debt, and that in consequence the debt was lost. The giving of time would be a present and a valuable consideration ; and a pledge in these terms would be the same as a pledge for money paid down. Here the principle is plainly announced ; for the case put is but an illustration of the principle, and applies with great force to the case in hand. Where the holder of a note or bill has not paid value for it, he is in privity with the first holder, and will be affected by anything that would affect the first holder. *Collins v. Martin*, (1 Bos. & Pul. 651.) But no evidence of want of consideration, or other ground, to impeach the apparent value received, was ever admitted in a case between an acceptor, a drawer, or maker, and the person holding the bill or note for value. There is no evidence that the plaintiffs were aware of the nature of the transaction between the maker and payee. There was a pre-existing debt between the plaintiffs and the payee, for which they had a collateral security amply sufficient for their entire indemnity. One of the firm obtains possession of the bond for the particular purpose of reducing it into cash, and with the proceeds paying the amount due on the note. The money was raised by them, and instead of paying it over, as was the understanding, and their duty, in lieu thereof they assign to them the note now in suit. Now in what situation did Robinson and Smith, at the time of the transfer, stand to the plaintiffs? Clearly in the light of agents, with the money of the principals in their hands, recoverable by action of assumpsit for money had and received, and which might have been followed by them into any specific property into which they may have converted it. As for instance, if they had purchased

stock, it would have been subject to their claim. 3 Maule & Selw. 562. The proceeds of the bond, to the amount of the lien, were theirs, and there is no evidence—but the reverse may be inferred—that the parties intended to convert the transaction into a mere personal contract between them. And if this had been the effect, it is far from clear, that if the right to a special action in the case had been relinquished, it would not have been a valuable consideration. The consideration is everything—the amount of it nothing, unless it is a colorable consideration. But be this as it may, the plaintiffs are holders for value. For what is this but an exchange of securities? and this, if it needed authority, has been ruled to be a sufficient consideration, in *Hornblower v. Proud* (1 Barn. & Ald. 333). But it is said, it is the exchange of one collateral security for another collateral security—and this is true: but may not the former have been of more value than the latter, as it undoubtedly was here, although that is an immaterial circumstance, so far as the legal point is involved. It is very plain, that had the plaintiffs retained their original security, they would have had no difficulty whatever. It has been produced solely by the exchange of securities. The same general rules which apply to the nature of the consideration for other simple contracts are applicable here. If a man give his acceptance to another, that will be a good consideration for a promise on another bill, though such acceptance is unpaid. And cross acceptances for mutual accommodation are respectively considerations for each other. *Rose v. Sims* (1 Bar. & Ad. 521); *Cowles v. Dunlap* (7 T. R. 565); *Buckler v. Buttevant* (3 East, 72). In *Bosanquet v. Dudman* (1 Stark. 1), it was held, that when a banker's acceptances for his customer exceeded the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker, as collateral security, whenever the acceptances exceeded the cash balance, the banker held the collateral bills for value. The reason that a negotiable note transferred as a collateral, does not constitute the holder a purchaser for value, is, that he is supposed, although very often contrary to the fact, to be in no worse situation than he was before. But that is not the case where there is a new and distinct consideration superinduced by the transfer and exchange of securities. It is not a past, but a present consideration.

The plaintiffs in error contend, that the judge erred, 1st, in charging the jury, that a parting with the possession of the bond

for the purpose of a sale of it, was no surrender of the property in it; and that the parting with the possession did not imply that the plaintiffs gave up their claim to it. Coupled with the evidence, we see no error in the charge; as it was the understanding of the parties, and the jury have so found, that it should be used for the special purpose of converting the bond into money, and paying the plaintiff's debt. Quoad this amount they were the agents of the plaintiffs.

2d. In charging that if the defendant slept upon the knowledge that the plaintiffs held the note, and did not immediately give them notice that no value had been received for it, it was a circumstance for the consideration of the jury, in reference to his liability. The answer refers to the plaintiff's ninth point; and it may be doubtful whether, if there be error at all, it is not against the plaintiffs. It is conceded that the plaintiffs were not aware of the want of consideration between the original parties; at least there is no proof of it; that they were resting under the conviction that there was no want of faith between them; and there was at least a moral obligation on the defendant, as soon as he was informed of the true state of the case, to take the earliest opportunity to apprise them of it, that they might secure themselves; but instead of this, he seems to rely on the promise of Robinson & Smith to indemnify him by payment of the plaintiff's debt. There is nothing to complain of in this part of the charge, as it certainly was a circumstance which the jury might take into consideration.

Judgment affirmed.

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Contracts under seal, derive their force from execution and delivery, and do not ordinarily require the support of a consideration. Here the common agrees with the civil law, in deriving the obligation from the assent of the covenantee, and the expectation created in his mind that the promise will be fulfilled. A covenant to pay money or do any other act, is accordingly not less binding because the obligation is unilateral and the covenantee is to give nothing for what he receives. But parol or unsealed agreements were invalid and could not be made the foundation of a recovery in damages, even when the effect of the breach was to disappoint the just expectation of the promisee. This was not because the law disregarded the obligation of the promise, but because the form which it required was not observed, and such, with a qualification to be hereafter noted, is still the rule at the

present day. *Rann v. Hughes*, 7 Term. 350 (ante, 112); *Thorn v. Deas*, 4 Johnson, 84; *Dorlin v. Ward*, 6 Id. 194; *Clark v. Small*, 6 Yerger, 418; *Loomis v. Newhall*, 15 Pick. 159; *Cook v. Bradley*, 7 Conn. 57; *Bixler v. Ream*, 3 Penna. R. 282. The distinction taken by Lord Mansfield in *Pillans v. Van Mierop*, 3 Burrow, 1663, between oral and written contracts was overruled in *Rann v. Hughes*, and *Johnson v. Collins*, 1 East, 98, and does not now prevail in England or the United States. *The Bank of Ireland v. Archer*, 11 M. & W. 383, 389. If the courts might properly refuse to enforce a gratuitous promise, there would be gross injustice in allowing a man to induce others to render services or give value in any other form, by a promise of compensation, and then withhold the stipulated reward. Such conduct is not merely a breach of contract, but a violation of good faith, akin to fraud; see 2 Reeve's History of the Common Law, 508; *Wilson v. Clements*, 3 Mass. 1; *Thorn v. Deas*, 4 Johnson, 84; *Burnett v. Biscoe*, Id. 235; *Noble v. Smith*, 2 Id. 52; *Fink v. Cox*, 18 Id. 145. A line of demarcation was accordingly drawn between promises assuming to bind the promisor absolutely, and promises coupled with a stipulation that something should be done or promised on the other side, and while the former were referred to the tribunal of conscience, a remedy was afforded for the non-fulfilment of the latter in the shape of an action on the case. Such was the origin of the action of assumpsit, which setting out in tort, came by slow degrees to be a remedy purely ex contractu. To be binding at common law, a promise must therefore be coupled with some express or implied request, operating as a condition, and that will when performed enure as a consideration for the support of the promise (ante, 113). And when such a condition does not exist or is not fulfilled, the promise will not be rendered binding by the assent of the promisee. The condition may be that the promisee shall promise or that he shall perform, but a condition of some sort, is indispensable to the validity of the contract (ante). This is true even where the promisee varies his position or adopts a course of action from which he cannot recede, in the expectation that the promise will be fulfilled. For although parol contracts derive their obligation from the liability incurred by one party on the faith of the assurance given by the other, still the liability must arise from some act which the latter has required, and not be a mere casual or incidental result of the expectation awakened by his language. *Muirhead v. Kirkpatrick*, 4 Harris, 117; *McClure v. McClure*, 1 Barr, 374, 377. A naked promise to contribute to the support of another, will not be rendered valid by proof that the latter contracted debts or incurred expenses, in the belief that the anticipated benefaction would afford the means of payment. "Consideration," said Bell J., in *Kirkpatrick v. Muirhead*, 4 Harris, 117, 126, "must be the result of

agreement. The parties must understand and be influenced to the particular action by something of value, of convenience or inconvenience, recognized by all of them as the moving cause. That which is a mere fortuitous result, flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration." In other words, unless the consideration is inherent in the promise when originally made, the contract will be void, and the deficiency cannot be supplied by a gratuitous or voluntary act done by the promisee, although induced by and a natural result of the confidence reposed in the good faith and diligence of the promisor. Proof that the defendant promised to pay the debt of a third person, and that the plaintiff in consequence thereof forbore to proceed against the debtor, will not therefore support an action, unless the promise was so worded as to be an express or implied request for time, *Bixler v. Ream*, 3 Penna. 282; and although marriage may be a valuable consideration, it must appear not only that the defendant took a wife on the faith of the defendant's promise to afford pecuniary assistance, but that the defendants promise was in effect a request that the plaintiff would get married.

In like manner, a naked promise to roof a house, or effect an insurance for the plaintiff, cannot be enforced, even when the latter sustains special damage, from his reliance on the good faith and punctuality of the defendant. *Thorn v. Deas*, 4 Johnson, 84; *Elsee v. Gatwood*, 5 Term, 143; *Balfe v. West*, 13 C. B. 466. In *Thorn v. Deas*, the plaintiff told the defendant that unless the defendant would insure a vessel, in which both were interested, the plaintiff would take the policy out himself, and the defendant promised in reply to do as the plaintiff desired. The contract was held invalid for want of a consideration; but the result might have been different if it had appeared that the defendant promised to insure if the plaintiff would refrain from insuring, and that the latter forbore in consequence of the request. For although the consideration must consist in some act done or avoided by one party at the instance of the other, the detriment sustained by the former, need not be beneficial to the latter. *Haines v. Haines*, 6 Maryland, 435; *Kennedy v. Cotton*, 28 Barb. 59; *Brown v. Rea*, 10 Iredell, 72. And in *Watkins v. James*, 3 Jones, 195, 5 Id. 105, proof that the plaintiff had trusted to a gratuitous promise by the defendant to obtain security, and in consequence thereof, refrained from attending to the business personally, was held sufficient to warrant a recovery. So a promise of indemnity may be valid, even when, as in the case of a guarantor or surety, no profit accrues to the promisor, and the sole object of it is to benefit the principal. *Underhill v. Gibson*, 2 New Hamp. 352. Accordingly, while a promise to bestow or settle a sum certain upon another, cannot be rendered binding, by proof that the

latter has made a purchase, from which he would have refrained if the promise had not been given; a recovery may be had on a promise to provide the means of payment if another will buy, because the liability incurred by the promisee is a sufficient consideration for the obligation assumed on the other side. Chitty on Contracts, 52, 6th ed.; *Crosbie v. McDouall*, 13 Vesey, 148, 158.

It results, from the same principle, that a promise to pay money on the happening of a contingency, not depending upon or to be brought about by the action of the promisee, or of some one standing in privity with him, is a *nudum pactum*, which will not become valid on the happening of the event on which it was conditioned. *Stewart v. The Trustees*, 2 Denio, 413, 417; *Corson v. Mulvany*, 13 Wright, 88, 89. And the rule that damages cannot be recovered for a breach of contract, unless some act has been done, or some obligation incurred by the plaintiff, went so far, that when a promise was made by one man in consideration of services to be rendered by another, the right of suit lay with the latter, because he had complied with the terms prescribed, and would be the loser if the promise was not fulfilled. *Edmundson v. Penny*, 1 Barr, 334. To render a parol contract binding, there must, consequently, be, first, a promise, coupled with and depending upon a condition, and constituting an agreement properly so called, and, next, such a performance of the condition, as will give a right to enforce the promise (ante, 113). The request, which lies at the foundation of most oral contracts is, accordingly, interpreted by the law, as a conditional promise that if the thing required is done, as much shall be given in return as it is worth. 1 Smith's Leading Cases, 224; 6 Am. ed. And while the English cases decide that when an agreement is required to be in writing by statute, the writing must contain, not only what the promisor agrees to do, but what he demands in requital; they also establish, that the assent or acceptance of the promisor may be shown, when requisite *aliunde* by any means of proof; clearly indicating, that it does not enter into or form part of the agreement. *Powers v. Fowler*, 4 Ellis & Bl. 571; *Kennaway v. Treleavan*, 5 M. & W. 498, 510; 2 Smith's Leading Cases, 319, 6th American ed. An instrument guaranteeing the good conduct of a clerk or servant, must, consequently, show, that the consideration was the employment of the principal; but it need not contain a promise to employ him, or set forth that the guarantee was accepted; and the principle is the same when the promise is to be responsible for such goods as the principal may wish to purchase. *Stadt v. Lille*, East, 348; *Newbury v. Armstrong*, 6 Bing. 201; *Moore v. Campbell*, 10 Excheq. 323 (ante, 113); *Stewart v. The Trustees*, 2 Denio, 403; *Findly v. Ray*, 5 Jones, 125.

In the absence of fraud and undue influence, the law will not inquire into the adequacy of the consideration; *Train v. Gold*, 5 Pick.

383, 384; *Sturlyn v. Albany*, 2 Croke Elizbth. 67; *Pillans v. Van Mierop*, 3 Burrow, 1663; *Whitehead v. Greetham*, 1 McClelland & Young, 205; *Shadwell v. Shadwell*, 9 C. B., N. S. 159; *Hardesty v. Smith*, 3 Indiana, 39; *Baker v. Roberts*, 4 Id. 552; *Hind v. Holdship*, 2 Watts, 104; and the receipt of one shilling may give effect to a bargain and sale transferring a large and valuable estate, or uphold a guarantee imposing a contingent liability, that may ultimately amount to many thousand pounds. *Dutchman v. Tooth*, 5 Bing. N. C. 577; *Lawrence v. McCalmont*, 10 Howard, 426, 452. It has even been said that if A. promise to pay B. a sum certain if he will call for it at a particular time, and B. comes accordingly, the contract will be binding, and must be performed by A.; *Train v. Gold*, 5 Pick. 380, 384; *Stewart v. The Trustees*, 2 Denio, 403, 410, and in *Sigourney v. Sigourney*, 17 Conn. 511, a recovery was had on a promise to pay a sum of money in consideration of the release of an invalid demand, on the ground that setting the plaintiff's seal to the instrument was a sufficient consideration, even if he had no right that could pass or be extinguished by the deed. In like manner a promise that if the plaintiff will buy a farm, or take a wife, the funds to support the one or pay for the other shall be forthcoming, rests on a valuable consideration, although no benefit can, under these circumstances, result to the promisor from the agreement. *Shadwell v. Shadwell*, 9 C. B., N. S. 159; *Crosbie v. McDouall*.

In cases of this description, the consideration cannot properly be termed inadequate, because the material inquiry in assumpsit is not what the defendant has received, but whether the plaintiff will lose by what he did, if the promise is not fulfilled. *Rice v. Ashley*, 37 Conn. 204. And if this is made to appear, the measure of damages will ordinarily depend on the stipulated price or compensation, and not on the absolute or real amount of the injury. If this is true of things which have no fixed value, it does not apply when the inadequacy of the consideration appears on the face of the transaction, or is a necessary legal inference. *Loring v. Sumner*, 23 Pick. 98; *Stewart v. The Trustees*, 2 Denio, 416; *Kellogg v. Olmstead*, 28 Barb. 96; *Gilson v. Erbie*, 36 Texas, 173; *Schnell v. Nell*, 17 Ind. 29; *Reynolds v. Nugent*, 25 Id. 328. The forbearance or release of an invalid claim has accordingly been held insufficient to support an assumpsit, unless the contract is made after suit brought; *Edwards v. Baugh*, 11 M. & W. 641; *Kay v. Dutton*, 7 M. & G. 807; *Prater v. Miller*, 25 Ala. 320; *Stevenson v. Barnard*, 19 Barb. 292; *Buzby v. Conway*, 8 Maryland 255; *Jarvis v. Sutton*, 3 Ind. 289; or is a compromise of a doubtful or disputed right; 3 Leading Cases in Equity, 414, 3 Am. ed.; and in *Stewart v. The Trustees*, 2 Denio, 413, 416, the Chancellor said that a promise to give would not be rendered binding by a promise on the

part of the donee, to apply the money in the way prescribed. But this ceases to be true when the contract is executed by the payment or transfer of the fund, and an action may then lie for a breach of the express or implied trust. *Whitehead v. Gretham*, 1 McClelland & Young, 205.

The acceptance of a smaller sum cannot be a satisfaction of a greater, *Reynolds v. Nugent*; *Smith v. Bartholomew*, 1 Metcalf, 276, 1 Smith's Leading Cases, 540, 6 Am. ed.; because the creditor manifestly does not get an equivalent for what he cedes. *Cumber v. Wain*, 1 Strange, 426, "It must," said Pratt, C. J., in *Cumber v. Wain*, "appear to the court to be a reasonable satisfaction; at least the contrary must not appear." A promise to give a larger sum in return for a smaller, is invalid for a like reason, unless the payments are to be made at such an interval as to render it possible that one should be a sufficient compensation for the other. *Sheppard v. Rhodes*, 7 Rhode Island, 470, 475; *Phettiplace v. Steer*, 2 Johnson, 442; *Schnell v. Nell*. In *Sheppard v. Rhodes*, the Supreme Court of Rhode Island held in accordance with this principle, that the receipt of \$1 was not a sufficient consideration for a promise to pay \$1,000 at the end of the year; and the same point was decided in *Schnell v. Nell*. Such a case differs widely from those where the alleged inequality does not appear by computation, and can only be shown by extrinsic evidence.

The consideration may vary with the subject matter of the contract, and the nature of the end in view. Thus we know, that originally in the court of chancery, under the doctrine of uses, and afterwards in the courts of common law when uses became a matter of legal cognizance, the tie of blood or the connection of marriage when supported by the solemnity of a seal, was held sufficient to raise a use. But where the seal was wanting, and the contract was intended to take effect as a bargain and sale, which might in its origin rest merely in parol, no consideration was sufficient which did not consist in the payment of money or of money's worth; 2 Rolle's Abridg. 788, pl. 15. Consanguinity alone will not uphold a parol contract, or give effect to the assignment of a chose in action. 1 Leading Cases in Equity, 326, 331; Id. 366; Am. ed.; *Kennedy v. Ware*, 1 Barr, 445; *Fink v. Cox*, 18 John. 145. The transfer of a judgment to the daughter of the assignor, as an advancement, and in consideration of natural affection, was accordingly held invalid in *Kennedy v. Ware*. A precedent debt is not a consideration for any other promise than that which the law implies to pay when thereto requested, and will not raise a use, or sustain a bargain and sale of lands; *Ward v. Lambert*, Coke Eliz. 394; *Doe v. Hampton*, 8 Iredell, 457; unless the deed is taken in satisfaction, and not merely as a collateral security. Yet such a conveyance may be good as an equitable assignment, because equity looks to the object which is the



ultimate satisfaction of the debt. *The Central Bank v. Carter*, 26 Conn. 533, 542; *Alexander v. Ghiselin*, 5 Gill, 138, 186; *Burn v. Carvalho*, 7 Simons, 94; 4 Mylne & Craig, 690; *Bates v. Churchill*, 32 Maine, 31; *Blair v. Prince*, 20 Vermont, 205; *Walker v. Rostron*, 9 M. & W. 411, 413; 3 Leading Cases in Equity, 368, 3 Am. ed.

In determining the sufficiency of the consideration, regard must also be had to the nature of the remedy, and a contract may be valid as a trust, and yet inadequate to support a suit at law. A feoffment or other assurance operating by transmutation of possession, will support a limitation over to a third person who is a stranger alike to the consideration and the conveyance; 2 Rolle Abridg. 784, Use J. pl. 5, 6, 7, 8; and if such a limitation in a bargain and sale will not be executed by the statute, it may still be enforced as a trust in equity. *Stearns v. Palmer*, 10 Metcalf, 32; *Dennison v. Goehring*, 5 Barr, 175; *Morrison v. Bain*, 2 W. & S. 86; *Miller v. Pierce*, 2 Id. 97; 2 Smith's Leading Cases, 524, 6 Am. ed.

A consideration moving from one man may therefore uphold a promise in favor of another, but it does not follow that the obligation can be enforced through the medium of an action of assumpsit. That action was originally in case for the injury inflicted by inducing the plaintiff to part with his labor or property by a promise of compensation, which the defendant wrongfully refused to fulfil. It could not therefore be maintained unless there was not only a consideration for the promise, but a consideration moving from the party by whom it was sought to be enforced. For where this was not the case the plaintiff was not deprived of anything that was his own, and could only complain of the loss of a benefit arising from a transaction in which he had no share. The weight of authority in England has accordingly been, from an early period, that assumpsit cannot be maintained by a party who is a stranger to the consideration. *Bourne v. Mason* 1 Ventris, 6; *Crow v. Rogers*, 1 Strange, 592; *Price v. Easton*, 4 B. & Ad. 433; 1 Smith's Leading Cases, 266, 6 Am. ed.; *Tweddle v. Atkinson*, 1 B. & Ad. 393.

The rule has been followed in numerous instances in the United States, although in a restricted form, and with some qualifications. *Owings Ex'rs v. Owings*, 1 Harris & Gill, 485; *Finney v. Finney*, 4 Harris, 388; *Mellen v. Whipple*, 1 Gray, 317; *Carter v. Browson*, 1 Cushing, 491; *Comfort v. Eisenebeis*, 1 Jones, 13, 16; *Cummings v. Klapp*, 5 W. & S. 511; *Campbell v. Lacock*, 4 Wright, 448; *Blymire v. Boistle*, 6 Watts, 182; *Morrison v. Birkey*, Ib. 349; *Hubbert v. Borden*, 6 Wharton, 79.

In *Warren v. Batcheder*, 15 N. H. 129; 16 Id. 580, the surrender of a note by A. to B., was held insufficient to support a promise by B. to pay the amount of the note to C., because the consideration came

solely from A. It was said to be a cardinal point in the law that the legal interest in a simple contract and the right to enforce it resides in the person from whom the consideration moves. The same ground was taken in *Edmundston v. Penny*, 1 Barr, 334, where Gibson, Ch. J., held that if the consideration and the promise do not meet in the same person, the promise should be drawn to the consideration, and not the consideration to the promise. It was accordingly decided that where a written promise was given to one man in consideration of services rendered by another, the suit must be brought by the latter and not by the former. So in *Lucas v. Chamberlain*, 8 B. Monroe, 76, the court held that a promise to indemnify two persons for becoming security for a third, might be declared on by both although made only to one of them.

The same principle lies at the foundation of the rule that satisfaction by a stranger will not extinguish the debt as between the parties, unless given in the name and on behalf of the debtor, and ratified by him, because he is otherwise a stranger to the consideration, and cannot plead the accord in bar. *Phillips v. Berger*, 2 Barb. 608, 8 Id. 527; *Daniels v. Hollenback*, 19 Wend. 423; *Jones v. Broadhurst*, 9 C. B. 173; *Belshaw v. Bush*, 11, Id. 91; *Simpson v. Eggenton*, 10 Exchequer, 845; *Leavitt v. Morrison*, 6 Ohio, N. S. 71; *Clow v. Borst*, 6 Johns. 37; *Stark's Ex'rs v. Thompson's Ex'rs*, 3 Monroe, 296, 1 Smith's Leading Cases, 558, 581, 6 Am. ed. "A consideration," said Patteson, J., in *Thomas v. Thomas*, 2 Q. B. 859, "means something which is of some value in the eye of the law, moving from the plaintiff. It may be of some benefit to the defendant, or some detriment to the plaintiff, but at all events, it must move from the latter." In other words, to constitute a consideration in assumpsit, the plaintiff must have acted on the faith of the promise made by the defendant, by parting with value or making a reciprocal agreement; *Wright v. Ashley*, 32 Conn. 297, 304.

If the action of assumpsit still bears the marks of its origin in tort, it soon becomes the usual and appropriate cause for the breach of every obligation not arising by specialty. *Slade's Case*, 4 Coke, 29. The indebitatus counts, which took the place of the action of debt, proceed on an antecedent obligation and an implied promise that it shall be fulfilled, and there has been an increasing tendency to bring equitable obligations within the reach of the same principle. A promise in favor of one man, founded on a consideration moving from another, obviously binds the conscience of the promisor, and there are English dicta and decisions which support the idea, that such a promise may be enforced in assumpsit by the party interested in its fulfillment. *Dutton v. Poole*, 2 Levinz, 210; *Marchington v. Vernon*, 1 Bos. & Pul. 101; *The Co. of Felt Makers v. Davis*, 1 Bos. & Pul. 99, 102; *Pigott v. Thompson*, 3 Id. 149.

An opinion was expressed as far back as the case of *Gilbert v. Ruddiard Dyer*, 273 (*in notis*), that a creditor might recover in assumpsit, on an express promise for the payment of the debt, in consideration of money deposited for that purpose in the hands of the defendant by the debtor. And it is now generally admitted, that where the consideration consists of money received from one man for the benefit of another, an obligation arises in favor of the latter, which may be enforced by him through the medium of a count for money had and received to his use; *Williams v. Everett*, 14 East, 582; *De Bernales v. Fuller*, Ib. 590, note; *Farmer v. Russell*, 1 Bos. & Pul. 295.

The right of recovery in these cases, has sometimes been put on the ground of an agency growing out of the receipt of the money for the use of the plaintiff, and a subsequent ratification by the demand or suit of the latter; *Lilly v. Hayes*, 5 A. & E. 548. Thus, in *Harris v. De Bevoir*, 2 Rolle, 440, Ley, C. J., said, that the right to bring debt for money delivered to the defendant by a third person, for the purpose of being given to the plaintiff, depended on whether the defendant could be considered as acting as the servant of the plaintiff with reference to the particular transaction. It is well settled in accordance with this doctrine, that the liability arising from the receipt of money from a debtor, for payment to the creditor is *prima facie* to the person from whom it is received, and that the creditor cannot recover without showing that the defendant received or held it for him, and not merely as the agent of the person by whom it was paid; *Williams v. Everett*, 14 East, 582; *Stephens v. Babcock*, 3 B. & Ad. 354; *Howell v. Batt*, 5 Id. 504; *Bigelow v. Davis*, 16 Barb. 561; *Bloomer v. Denman*, 12 Illinois, 140; *Warren v. Batchelder*, 15 N. Hamp. 129; *De Bernales v. Fuller*, 14 East, 584; *Lilly v. Hayes*, 5 A. & E. 395; *Wyman v. Smith*, 2 Sandford, Supreme Court, 331; *Finney v. Finney*, 4 Harris, 380; *Hopkins v. Beebee*, 2 Casey, 85. The material question in cases of this description is as Lord Ellenborough intimated, in *Williams v. Everett*, whether the transfer was so far completed as to be irrevocable, and give the person for whose benefit it was made a right of property in the fund. *Draughan v. Bunting*, 9 Iredell, 10; *Weston v. Barker*, 12 Johns. 276; 3 Leading Cases in Equity, 363, 3 Am. ed. And whatever the rule may have been formerly, it is now established, that when one man holds a sum certain or capable of being reduced to certainty, which belongs, in point of right and justice to another, the law will give the latter a remedy, by implying a promise of payment on the part of the former. *Wilson v. Sergeant*, 12 Ala. 778; *Fleming v. Alter*, 7 S. & R. 295; *Baker v. Root*, 4 McLean, 572; *Johnson v. Evans*, 8 Gill, 155; *Down v. Halling*, 4 B. & C. 330; *Hudson v. Robinson*, 4 M. & S. 478; *Calland v. Lloyd*, 6 M. & W. 26; *Pierce v. Crafts*, 12 Johns. 90; *Mason v. Waite*, 17 Mass. 560; *Hall v. Marston*, Ib. 575; *Arms v. Ash-*

*ley*, 4 Pick. 71; *Hunt v. Nevins*, 15 Id. 500; *Neilson v. Blight*, 1 Johnson's Cases, 205; *Stoever v. Stoever*, 9 S. & R. 431; *Brown v. O'Brien*, 1 Richardson, 268; *Tiernan v. Jackson*, 5 Peters 597; 2 Story's Equity Juris. 1041. In some of the cases, this doctrine has been carried to the extent of implying and sustaining an assumpsit, as the means of enforcing the payment of money by a trustee to his cestui que trust; *Fleming v. Alter*; *Baker v. Root*; *Arms v. Ashley*; although this course of decision should only be followed where the trust is executed, and the amount due to the plaintiff can be ascertained; *Deas v. Brunel's Ex'rs*, 24 Wend. 9; *Hitchcock v. Lukens*, 8 Porter, 333; *Bartlett v. Dimond*, 14 M. & W. 49; *Pardoe v. Price*, 13 Id. 302; 16 Id. 451; by the methods known to the law, and without the aid of equity. *Rathbone v. Stocking*, 2 Barb. 175.

The exception to the general rule, that the consideration must move from the party who seeks to enforce the assumpsit, is limited in England to cases where money has been received by the defendant for the use of the plaintiff, or where he has converted property equitably belonging to the plaintiff into money. *Tollitt v. Sherstone*, 5 M. & W. 283; *Nightingale v. Davidson*, 5 Burr. 253; *McLachlin v. Evans*, 1 Y. & J. 380. Assumpsit, consequently, will not lie for a horse placed in the hands of the defendant to be delivered to the plaintiff; *Collett v. Sherstone*, 5 M. & W. 283, and the rule was formerly the same when the deposit consisted of foreign coin or currency; *McLaghlin v. Evans*, 1 Y. & J. 380, although the authority of this decision was questioned in *Ehrensperger v. Anderson*, 3 Excheq. 148.

There is, however, a numerous class of decisions in the United States, in which it has been held, that the receipt of goods and chattels from one man for the benefit of another may give rise to an obligation which the latter can enforce by suit; *Farley v. Cleveland*, 4 Cowen, 432; 9 Id. 639; *Barker v. Bucklin*, 2 Denio, 45; *Stewart v. The Trustees of Hamilton College*, Ib. 463; *The Delaware and Hudson Canal v. The Washington Bank*, 4 Id.; *Blunt v. Boyd*, 3 Barb. 269; *Hind v. Haldship*, 2 Watts, 104; *Beers v. Robinson*, 9 Barr, 229; *Vincent v. Watson*, 6 Harris, 96; *The Commercial Bank v. Wood*, 7 W. & S. 89; *Arnold v. Lyman*, 17 Mass. 100; *Hall v. Marston*, 17 Id. 575; *Carnegie v. Morrison*, 2 Metcalf, 381; *Schermerhorn v. Vanderheyden*, 7 Johns. 139; *Holly v. Rathbone*, 8 Id. 148.

Such obligations are ordinarily founded on the transfer of assets by a debtor with a view to the payment of his debts, or of a particular creditor, and may be ranged under two heads, that where the undertaking of the promisor is limited to the faithful administration of the assets which form the consideration of the promise, and that where he agrees absolutely to pay the amount due, whether the fund is or is not adequate. The latter class are clearly *ex-contractu*, and the parties beneficially in-

interested cannot maintain assumpsit consistently with the rule of the common law. *Campbell v. Lacock*, 4 Wright, 448, 451; *Whipple v. Mellen*, 1 Gray, 317; *Finney v. Finney*, 4 Harris, 380; *Treat v. Stanton*, 14 Conn. 445.

The former class may be viewed as trusts conferring an equitable right on the beneficiaries, which may be enforced through the medium of an implied promise. But the aid of equity will still be requisite to take an account, and ascertain the shares of the parties, unless the plaintiff is the only person claiming or entitled to the fund. *Clapp v. Lawton*, 31 Conn. 95, 105; *Beach v. Hotchkiss*, 2 Conn. 425; See *Shoemaker v. King*, 4 Wright, 107, 110. In *Clapp v. Lawton*, the court said, that if the fund belonged to the creditors, they had a common interest in ascertaining how much had been collected, and what deductions should be made for costs and charges. If separate actions were brought, these questions would be laid before different juries who might view them differently, and the result would be an unequal distribution of the fund. The case was therefore manifestly one for the jurisdiction of equity, where all the parties could be brought before the court and an account taken that would be binding on all.

It was held in like manner in *Millard v. Baldwin*, 3 Gray, 484; that when assets are received for distribution among creditors, they cannot sue at law, because each would have to proceed separately, and there might be as many judgments as there are debts.

When, however, assets are delivered by A. to B. with an express or an implied agreement that the latter will account for or deliver them to C. in discharge of a debt due to him by A., the transaction may operate as a trust for C. *Beers v. Robinson*, 9 Barr, 229; *Campbell v. Lacock*, 4 Wright, 448, 450. Under these circumstances, B. is a mere instrument, and the beneficial interest vests exclusively in C. But the case is obviously different when the right of property vests in B., and C. acquires a mere right of action. The only difference between such a transaction and an ordinary contract of sale, is that the price is to be paid to the vendor's creditor, and not to the vendor. Obviously the creditor may decline to become a party to the arrangement, and proceed against the original debtor. But he may also, agreeably to the authorities in New York, and some of the other States, ratify the contract and enforce it by a suit. *Farley v. Cleveland*, 4 Cowen, 432; 9 Id. 939; *Schermershorn v. Vanderheydin*, 1 Johnson, 148; *The Delaware Co. Bk. v. The West Chester Bk.* 4 Davis, 97; *Barker v. Bank Co.* 2 Davis, 45; *Bagaley v. Waters*, 7 Ohio, N. S., 369; *Lawrence v. Fox*, 20 New York, 268; *Arnold v. Lyman*, 17 Mass. 400; *Hall v. Marston*, Id. 575; *Vincent v. Watson*, 6 Harris, 96; *The Bank v. Woods*, 7 W. & S. 89. In *Farley v. Cleveland*, Moon was indebted to Farley. He sold hay

to Cleveland who promised in consideration thereof, to pay Farley. Judgment was entered for the latter on the contract.

In like manner where a bank took a draft as so much money, and in consideration thereof, agreed to pay certain promissory notes of the person who deposited the draft, the holders of the notes were allowed to maintain assumpsit against the bank. *The Commercial Bank v. Wood*, 7 W. & S. 89. A similar view was taken in *Lawrence v. Fox*; in opposition to the dissenting opinion of Comstock, Ch. J., who contended that a consideration moving from one man could not support a promise in favor of another, unless the right of property passed directly to the latter, instead of vesting in the promisor. The defendant being in need of money borrowed it from Fox, promising to pay the amount next day to the plaintiff, to whom Fox was indebted. The court said, that if the defendant had received the money in trust for the plaintiff, the law would have implied a promise in favor of the latter, and that the express promise took nothing from the strength of the obligation. See *Chancellor v. King*, 4 Wright, 107; *Curtis v. Brown*, 5 Cushing, 491; Smith's Leading Cases, 487, 6 Am. ed. So in *Bagaley v. Waters*, 7 Ohio, N. S. 359; the Supreme Court of Ohio, were clearly of opinion, that a promise to pay the debts of an insolvent in consideration of a transfer of his assets might be enforced at law by the creditors, although strangers both to the promise and consideration, because the debts were to be paid in full, and it was not necessary to apportion the assets among the creditors and ascertain the amount due to each. "The rule was laid down in Chitty's Pleadings, vol. I, page 5; 'that when a contract not under seal is made with A. to pay B. a sum of money, B. may maintain an action in his own name; but if the promise had been to pay A. for the use of B., A. is a trustee, and B. having no legal interest cannot sue.' In *Starkie v. Starkie*, Styles Rep. 296; the case was this: The father gave goods to his son in consideration, that the son would pay the plaintiff twenty pounds. Rolle said there is a promise in law made to the plaintiff though there be not a promise in fact, there is a debt, and assumpsit is good."

"The cases of *Green v. Horn*, Cumb. Rep. 219; *Dutton v. Pool*, 1 Vent. 318; *Martin v. Hind*, 2 Cowper, 443, and *Whorwood v. Shaw*, Yelv. 23, all affirm the same doctrine. So in *Schermerhorn v. Vanderheyden*, 1 John Rep. 139, the court said where one person makes a promise to another for the benefit of a third, that third person may maintain an action on such promise, and such is the settled law in this State. In *Krumbaugh v. Kugler*, 3 Ohio St. Rep. 549, the court say, if for a valuable consideration, A. promise B. to pay C. a sum of money, C. may recover it in an action of assumpsit against A.; and so in *Thompson v. Thompson*, 4 Ohio St. Rep. 353."

The rule that privity is not essential in actions *ex-contractu*

was laid down broadly in *Brewer v. Dyer*, 7 Cushing, 339. Bigelow, J., said: "It is well settled in this Commonwealth, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. *Felton v. Dickinson*, 10 Mass. 287; *Ball v. Marston*, 17 Ib. 575; *Arnold v. Lyman*, Ib. 400; *Carnegie v. Morrison*, 2 Met. 381. In the latter case, all the authorities are fully reviewed in the opinion of the court, and the rule of law clearly vindicated and established. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; *Dutton v. Pool*, 1 Vent. 318; 2 Walford on Parties, 1144; nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff (per Coleridge, J., in *Lilly v. Hays*, Ad. & E. 551); but upon the broader and more satisfactory basis, that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

A recovery cannot, however, be had, in any form of action unless the amount due is certain in itself, or capable of being reduced to certainty by the methods of procedure known to the law. When, therefore, the fund is held in trust for distribution among several persons, or the obligation is not to pay over, but to account for the balance remaining after charges and disbursements, assumpsit will not lie, and a remedy must be sought in an action of account render or a bill in equity. *Millard v. Baldwin*, 3 Gray, 484, *Reeside v. Reeside*, 13 Wright, 322; *Beach v. Hotchkiss*, 2 Conn. 425; *Treat v. Stanton*, 4 Id. 445; *Clapp v. Lawton*, 31 Id. 95; *Fitch v. Chandler*, 4 Cushing, 254; *Frost v. Gage*, 1 Allen, 262. And in *Pardoe v. Price*, 16 M. & W. 451, and *Bartlett v. Diamond*, 14 M. & W. 49, the rule was laid down broadly, that an action cannot be maintained for money had and received in the execution of a trust, unless the trustee has by stating an account, or in some other way, admitted that a definite sum is due and owing to the plaintiff. See *Reeside v. Reeside*. When, however, the promise is absolute to pay, whether the debts do or do not exceed the assets, this objection does not apply, and the contract may be enforced if valid in other respects, notwithstanding the failure or insufficiency of the fund. *The Commercial Bank v. Wood*, 7 W. & S. 89. This distinguishes such cases from actions for money had and received, where the obligation is equitable, and any defence that could have been made as between the original parties, will be good against the plaintiff.

Another obstacle to a recovery in cases of this description may arise from the statute of frauds, which is held in some of the States

to invalidate a promise to pay the debt of another in consideration of assets received from him; *Clapp v. Lawson*, 31 Conn. 95; *Curtis v. Brown*, 5 Cushing, 448; although the better opinion would seem to be that when the consideration moves to the promisor, the debt is his and the case is not within the statute. *Mallory v. Gillet*, 23 Barbour, 610, 21 New York, 412; *Dyer v. Gibson*, 16 Wisconsin, 557; *Tibbetts v. Flanders*, 18 New Hampshire, 284; *Stoudt v. Hine*, 9 Wright, 30; 1 Smith's Leading Cases, 483, 6 Am. ed.

In the great majority of instances in which the question has arisen, the promise was not made to the party who brought the suit, and what they establish, is, not so much that the plaintiff must be the source of consideration, as that he must not be a stranger to the promise. See *Esling v. Zantzinger*; *Finney v. Finney*; *Campbell v. Lacock*; *Owings v. Owings*. It has accordingly been said, that when all the parties are privy to the contract, the consideration need not move from him who sues. *Esling v. Zantzinger*, 1 Harris, 50. If it is agreed between A. B. and C. that A. shall pay B., in consideration of value given by C., the contract may, agreeably to this view, be enforced by B. *Esling v. Zantzinger*. Some of the decisions may admit of this distinction, as for instance; *Owings v. Owings*, 1 Harr. & Gill, 485; but it is not applicable to others, and will not serve to explain *Edmundston v. Penney* (ante, 170), where the point was decided the other way. See *Campbell v. Lacock*, 4 Wright, 448. *Esling v. Zantzinger*, is one of the numerous instances where the actions of assumpsit has been used to enforce an equitable appropriation or assignment. The weight of authority would, however, seem to be, that where privity of contract exists, the want of privity of consideration is not a conclusive objection to the right of suit. If A., B. and C. agree that B. shall pay money to C. or perform work and labor for him, in consideration of an act done by A., the consideration is, by force of the agreement as much C.'s as if it came directly from him. See *Esling v. Zantzinger*, 1 Harris; *Campbell v. Lacock*, 4 Wright, 448.

Whatever may be thought on this point, privity is ordinarily requisite to the obligation of a promise; *Sailly v. Cleveland*, 10 Wend. 156; *Newcomb v. Clark*, 1 Denio, 227; *Tollitt v. Sherstone*, 5 M. & W. 283; *Jordan v. Jordan*, Cro. Eliz. 369; *Hassinger v. Solms*, 5 S. & R. 413; *Eastman v. Ramsey*, 3 Ind. 419; *Britzell v. Fryberger*, 2 Id. 176; *Conkling v. Sellers*, 7 Id. 107; *Farlow v. Kemp*, 7 Blackford, 544; Pothier on Obligations, Part 1, ch. 1, sect. 1; and a stranger who seeks to enforce a contract, must show that his case is an exception to the general and well settled rule. *Mellen v. Whipple*, 1 Gray, 317; *Farlow v. Kemp*, 7 Blackford, 504; *Finney v. Finney*, 4 Harris, 380; *Campbell v. Lacock*, 4 Wright, 483; *Treat v. Stanton*, 14 Conn. 452; *Millard v. Baldwin*, 3 Gray, 414; *Page v. Becker*, 31 Missouri, 467.

In *Treat v. Stanton*, 14 Conn. 452, the court said, it had undoubt-



edly been held, that a person who was beneficially interested in the performance of the contract, might enforce it by suit. The principle was, however, confined to cases where the person for whose benefit the promise was made, had the sole and exclusive interest in the performance of the promise. Under these circumstances, he might be regarded as the real party to the contract, and the nominal promisee as an agent acting in his behalf. The rule, as stated by Mr. Chitty, was, that a party for whose sole benefit a promise is made, may sue thereon in his own name, although the engagement be not directly made with him. 1 Chitty's Pl. 4. The rule that the legal interest must reside in the plaintiff, had not been relaxed by the courts. They merely held, that the party who was solely interested, was legally interested within the meaning of the rule.

In *Mellen v. Whipple*, 1 Gray, 317, Metcalf, J., observed that it had been contended, on the authority of Lord Holt, in *Sard v. Eland*, 1 Lord Raymond, 368, that "on a promise not under seal, made by A. to B., for a good consideration, to pay B.'s debt to C., C. might sue A." This was not, however, the rule, but an exception to it, which had been narrowed rather than extended by the recent decisions in the English courts. The general rule was, and always had been, that the plaintiff in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration could not enforce the contract. Or, as the rule was sometimes expressed, there must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action by the plaintiff on the contract. *Crow v. Rogers*, 1 Strange, 592; *Ross v. Miller*, 12 Leigh, 204. *Indebitatus assumpsit*, for money had and received, might, however, be maintained, in various instances where there was no actual privity of contract between the plaintiff and defendant, and where the consideration did not move from the plaintiff. *Carnegie v. Morrison*, 2 Metcalf, 381. If a man had money in his hands, which in point of equity and good conscience belonged to another, the latter might recover in such a suit, although the source of the consideration lay in another quarter. A promise to a debtor, to pay his creditors, was valid on this ground. *Ellwood v. Monk*, 5 Wend. 355. And the case of *Carnegie v. Morrison*, showed that an agreement between the owner and the holder of a fund, to appropriate it to the use of a third person, would be binding in favor of the latter. Another exception to the rule might exist, where the contract was designed as an advancement to a child, nephew or other near relative of one of the parties, because the ties of blood might then supply the want of privity of contract. The case of *Dutton v. Pool*, 1 Ventris, 318, where the defendant promised a father who was about to fell a wood in order to raise a portion for his daughter; that, if he

would desist the defendant would pay the daughter £1,000. was an instance of this description, and others might be found in *Rookwood's Case*, Croke Eliz. 164; and *Tilton v. Dickerson*, 10 Mass. 287.

The case under consideration grew out of the purchase of an equity of redemption by the defendant, it being recited in the conveyance that he was to assume and cancel the mortgage and the note which it was given to secure. The promise implied from the acceptance of such a deed was not to the mortgagee, nor intended for his benefit, nor could it be said that the defendant had assets in his hands which in point of right belonged or were payable to the mortgagee. The contract was not, therefore, within any recognized exception to the rule, and could not be enforced by the mortgagee. If, as the declaration averred, a promise was made subsequently to him, it was invalid for want of a consideration.

There is obviously no substantial difference between a promise to pay the price of land to a creditor of the vendor, and a similar promise, in consideration of a sale of chattels. The distinction between *Mellen v. Whipple* and *Farley v. Cleaveland* (ante, 173), would, therefore, seem to be one of intention; that the promise was designed in the latter case to afford a remedy to the creditor, in the former as an indemnity to the mortgagor. A similar explanation may be given of *Brewer v. Dyer*, 7 Cushing (ante, 175), where a tenant sold his lease, with a stipulation that the purchaser should pay the rent throughout the term, and the lessor was allowed to enforce the agreement, apparently because the intention was that the purchaser should take the place of the tenant, and be primarily liable to the lessor.

The further distinction was taken in *Farlow v. Kemp*, 7 Blackford, 504; that a promise cannot be enforced by a stranger to it, unless there is some cause other than the promise, why it should take effect in his favor. In other words the plaintiff must not be a mere volunteer. The declaration averred, that the defendant had received one thousand dollars from one Michael Farlow, to be delivered to the plaintiff, but it did not aver that the plaintiff was a creditor of Farlow's, or that there was any privity or relation between them, rendering it inequitable that the money should be withheld. Under these circumstances the right of action was in Farlow and not in the plaintiff. This accords with the well established doctrine that an equitable assignment is not valid in the absence of a consideration in the assignee. 3 Leading Cases in Equity 367, 3 Am. ed.

It would, however, appear that when a deposit is made with A. in trust for B., or as gift to him, B., should have the right of suit, because the whole beneficial interest is in him, and he is the only person injured by the breach. A good consideration is, moreover, equivalent in equity, for some purposes to value, as in the case of a covenant to

stand seized (ante, 168); and a child or other near relative may consequently enforce a contract, which was designed for his benefit. *Dutton v. Pool*, 1 Ventris, 318; *Mellen v. Whipple*, 1 Gray, 317, 323; see *Rookwood's Case*, Croke Eliz. 164; *Fellon v. Dickenson*, 10 Mass. 287. See *Tweddle v. Atkinson*, 1 Best & Smith, 392.

The question is in great measure one of jurisdiction rather than of principle. The plaintiff may be entitled under the contract, and yet unable to maintain an action of assumpsit. The doctrine that a contract *inter partes*, may result in an obligation to a third person, is well established. *Cumberland v. Coddington*, 3 Johnson, Ch. 255; Pothier, part I., ch. I., sect. 1., art. 5, §3; *Hind v. Holdship*, 2 Watts, 104; *Vincent v. Robinson*, 6 Harris, 96; *Holly v. Rathbone*, 8 Johns. 148; *Brewer v. Dyer*, 7 Cushing; but it cannot ordinarily be applied at common law. When various and conflicting interests arise out of the same transaction, a legal tribunal cannot afford complete relief, and recourse must then be had to a court of equity, which can bring all the parties before it and adjust their respective rights and liabilities by one decree. *Clapp v. Lawton*, 31 Conn. 103; *Bird v. Lanus*, 7 Indiana, 615. If the consideration does not move from the plaintiff, it must move to him in such a sense, that redress can be given through an implied promise against the person by whom it is withheld, without injustice to him or the other contracting parties. This is the extreme limit of the legal remedy as defined in *Blymire v. Boistle*, and *Lilly v. Hays*. A court of equity may, however, go much further, and there has been a constant and increasing tendency on the part of the courts of law, to assume equitable jurisdiction. The cause of action in *Lawrence v. Fox* and *Brewer v. Dyer* (ante, 175), was manifestly equitable. So in *Vincent v. Robinson*, 6 Harris, 96; the garnishee in an attachment execution was allowed to show that he had promised to appropriate the price of the goods which he had bought from the defendants in the judgment, to the payment of their debts. It is however obvious that matter which would not sustain an action of assumpsit, as for instance an equitable assignment, may be a defence to an attachment, *Westoby v. Day*, 2 Ellis & Bl. 605. And the case of *Vincent v. Robinson*, may, together with *Hurd v. Holdship*, 2 Watts, 104; *Beers v. Robinson*, 9 Barr. 229; *Peries v. Aycenena*, 3 W. & S. 64; and *The Commercial Bank v. Robinson*, 7 Id. 89, be referred to the equitable principles which are administered in Pennsylvania by the courts of common law.

To render a contract between two persons binding in favor of a third, it must accordingly appear, first that it was intended to confer an indefeasible interest on the latter, and next that he is the only person interested in the performance of the contract, because the defendant might otherwise be made answerable twice for the same default.

*Blymire v. Boistle*, 6 Watts, 182; *Campbell v. Laycock*, 4 Wright, 448. Accordingly, an agreement between partners, that one of them shall take the assets and pay the debts of the firm, is not binding in favor of the creditors, and they cannot maintain an action against a third person who has guaranteed the fulfilment of the agreement. Their right is equitable and not legal, and must be enforced by a suit in the name of the outgoing partner. *Campbell v. Laycock*, *Morrison v. Berkey*, 6 Watts, 349, 352. In *Campbell v. Laycock*, Pearson J., said that "where the promisor receives the fund, or other consideration of the promise, in trust for a third party, there the action may be in the name of the latter. But, with the exception hereafter noticed, in all other cases; the action must be brought in the name of him from whom the consideration moved, or who was the meritorious cause of it, whether, as in *Blymire v. Boistle*, *Ramsdale v. Horton*, 3 Barr. 330, and other like cases, the promise be made to him from whom the consideration moved, or as in *Edmundston v. Penney*, 1 Barr, 334; and *Comfort v. Eisenbies*, 1 Jones, 13, it be made to a stranger to the consideration. The exception to the rule is in the case of an express promise upon a sufficient consideration to pay a third party where the latter participates in the contract; and in such case, as we have seen in *Esling v. Zantzinger*, the action may be maintained by reason of the privity of contract, in the name of the third party. In *Morrison v. Berkey*, 6 Watts, 349; is a case somewhat resembling the present. Morrison agreed with Vickroy to pay a debt due by the firm of which Vickroy was a member, for which Berkey was surety. Berkey paid the debt, and sued Morrison on his agreement; and it was held that, being a stranger to the consideration, as between Morrison and Vickroy, Berkey could not recover. So also in *Cummings v. Klapp*, 5 W. & S. 511, it is ruled that a promise to a constable to pay the amount of an execution in his hands, can only be enforced by an action in the name of the constable who gave the indulgence, and from whom therefore, the consideration moved, to whom the promise was made, and who was the party beneficially interested therein, and not in the name of the plaintiff in the execution, who was a stranger to the contract and consideration."

A similar view was taken in *Manney v. Frazier*, 27 Missouri, 419; where the court said if A. B. and C., agree that a debt due by B. to A. shall go in discharge of a debt due from A. to C., the contract may be enforced by C., because A.'s interest is at an end, and he will neither be injured by the violation of the agreement nor benefited if it is fulfilled, but that the case is widely different where C. does not intervene, and the contract is exclusively between A. and B. A promise by an outgoing partner to pay the debts of the firm, could not be enforced by the creditor, because the partner who remained

was interested in the contract, and might bring an action for the breach. In *Clapp v. Lawton*, 31 Conn. 95, 103, a promise to collect the assets of a debtor and pay the proceeds to his creditors, was in like manner held not to afford a ground of action to an individual creditor. The plaintiff was a stranger to the consideration and the promise, and could not maintain assumpsit for money had and received, because his share was not ascertained. For a like reason, if land is sold subject to a mortgage or other encumbrance, and the purchaser in consideration thereof agrees to pay the amount due on the mortgage or judgment, the encumbrancer may have recourse to equity, but cannot found an action on the promise at law. See *Morrison v. Berkey*, 349, 351; *Mellen v. Whipple*, 1 Gray, 517; *Cumberland v. Codrington*, 3 Johnson's Ch. 255.

The question whether a contract should be enforced at law at the instance of a third person, is, therefore essentially one of circumstances, and the jurisdiction may be concurrent or belong exclusively to equity. In *Blymire v. Boistle*, 6 Watts, 182, where Boistle sued Blymire on a promise made by him to one Gladstone, to pay Boistle a debt due by Gladstone, in consideration of a lot of ground conveyed by Gladstone to Blymire, the question was nearly the same as in *Lawrence v. Fox*, but was decided differently, on the ground that although Blymire had an interest in obtaining payment of the debt, Gladstone was also interested in having it paid, and the appropriate remedy consequently lay in chancery, which could give all the parties an opportunity of being heard, and close the controversy by a decree that would be binding on all.

The point was critically examined by Sergeant, J., who held the following language in giving judgment for the defendant: "Where one person contracts with another to pay money to a third, or to deliver over some valuable thing, and such third person is thus the only party in interest, he ought to possess the right to release the demand, or recover it by action. But when a debt already exists from one person to another, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity; and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time, for the same debt, which would be inconvenient, and might lead to injustice.

The case before us, in substance is, that the defendant, Blymire, in consideration of Gladstone's conveying his third part of a lot of ground to him, promised Gladstone to pay to Boistle, the plaintiff, a debt due by Gladstone to Boistle, on a judgment previously recovered against Gladstone by Keyser, and assigned to Boistle; and the question is, whether, in the absence of any evidence of the participation of

Boistle in the contract, or consideration money from him, or act done, or prejudice sustained by him, he can maintain this action in his own name against Blymire on this contract. It is clear that the right of proceeding on the judgment against Blymire remained in Boistle as before, whether the judgment was a lien on the property or not. He might either proceed by execution or by action of debt on the judgment. Gladstone thus remaining liable to Boistle, if Blymire failed to pay, according to his undertaking, Gladstone had a right of action against him on his promise, and for his own indemnity. If then by this action Blymire is liable also to Boistle, he may be twice sued. Who should be preferred? Or might not Blymire, in one event, be compelled to pay both? The equity of the case would be and chancery would decree, that Blymire should pay but once, and that the money should go to Boistle on his releasing Gladstone. But in two common law suits against Blymire it might be difficult to effect this equity. The suits must, therefore, be by Gladstone against Blymire, and by Boistle against Gladstone, and thus Blymire would be released by one payment to Gladstone, and Gladstone exonerated by paying Boistle; unless one suit should be brought in the name of Gladstone for the use of Boistle against Blymire." A comparison of this language, with that held in *Brewer v. Dyer*, will show, that the one oversteps the common law rule, that a suit cannot be brought by one who is a stranger to the contract and the consideration, as widely as the other, and only differs from it on the point, whether the equitable principle which gives compensation to him who is really injured by the breach, can be enforced at law in all cases, or must be confined to those, where the plaintiff has the whole beneficial interest in the contract, and no one else can suffer from the failure to perform it.

The authorities as a whole would seem to indicate that when the intention of the parties is to confer a right of action on a third person who will be injured by the breach, the law will imply a promise in his favor, if the loss will fall primarily or exclusively on him, and the circumstances are such that a judgment in assumpsit will cover the whole ground and be adequate to the ends of justice. *Lawrence v. For*, 16 N. Y., 268; *Barr v. Biers*, 24 Id. 178; *Krumbaugh v. Kugler*, 3 Ohio, N. S., 549; *Thompson v. Thompson*, 4 Id. 333; *Bagaley v. Waters*, 7 Id. 359; *Treat v. Stanton*, 14 Conn. 446; *Fellon v. Dickinson*, 10 Mass. 28; *Schermerhorn v. Vanderheyden*, 1 Johns, 430; *Hinckley v. Fowler*, 3 Shep. 285; *The Warren Academy v. Harrett*. Id. 443; *Steele v. Aylesworth*, 18 Conn. 244; *Barker v. Bucklin*, 2 Denio, 45; *The West Chester Bank v. Delaware Canal Co.*, 4 Id. 97. And the objection in *Blymire v. Boistle* to concurrent rights of actions for the same cause in different persons, has been obviated by holding that the election of the plaintiff to charge the promisor, discharges

the party who was originally bound. *The Commercial Bank v. Woods*, 7 W. & S. 89; *Warren v. Batchelder*, 15 New Hampshire, 16 Id. 580.

In applying the doctrine of privity of contract, it is necessary to recollect that the parties do not always appear in the contract. *The Rutland and Burlington Railroad Co. v. Cole*, 24, Vermont, 33. A writing addressed to one man may operate as a request to another, and thus give rise to an obligation in his favor. *Martin v. Hyde*, Cowper, 437; *Lawrason v. Mason*, 3 Cranch, 493; *Russell v. Higgins*, 2 Story, 213; *Carnegie v. Morrison*, 2 Metcalf, 381. It is well settled that a principal may enforce a contract made really with him, though nominally with his agent; *Hubbard v. Borden*, 6 Walton, 79; *Higgins v. Senior*, 8 M. & W. 834; *The Rutland and Burlington R. R. v. Cole*, 24 Vt. 33; and conversely a promise to a stranger in interest may revive an obligation between the parties. *McKinley v. O'Keeson*, 5 Barr, 59; *Piggott v. Thompson*, 3 Bos. and Pul. 147. These decisions depend on the general principle, that the promise may be drawn to the source of the consideration in furtherance of the intention; *Edmundston v. Penny*, 1 Barr, 334 (ante, 170), which also explains the numerous instances where a creditor has been allowed to enforce a letter of credit or prospective guaranty addressed to the principal. See notes to *Lawrason v. Mason* (post).

Whether a promise to one man will operate under this doctrine, to remove the bar of the statute of limitations, or a certificate in bankruptcy, from a debt due to another, is a doubtful question about which the authorities do not agree, although the tendency of the recent cases is against the power. See *McKinley v. O'Keeson*; *Gillingham v. Gillingham*, 5 Harris, 502; *Kyle v. Wills*, Ib. 286; *Wakeman v. Sherman*, 5 Selden, 85; *Goodman v. Colly*, 4 Hurlstone & Norman, 373; *Jordan v. Hubbard*, 26 Alabama, 483; *Evans v. Casey*, 29 Id. 89; 1 Smith's Leading Cases, 888, 6 Am. ed. A surety is, however, entitled to be subrogated to the remedies of the creditor, and may consequently take advantage of a promise to the latter to pay a debt, from which the principal has been discharged by a decree in bankruptcy. *Comfort v. Eisenbeis*, 1 Jones, 13; see *Way v. Sperry*, 6 Cushing, 238.

The rule that the consideration must move from the party who relies upon or seeks to enforce the contract, also meets with an exception when several persons agree to further a common purpose, and the promise of each may then sustain that of every other, although no consideration moves from the promisee. An agreement between creditors to discharge the debtor, either absolutely or on his paying a percentage of the amount due, is valid on this ground, notwithstanding the doctrine that a less sum cannot be a satisfaction of a greater. The agreement is without consideration as between the debtor and the

creditor, but the promise of each creditor to give up part of his claim, is a sufficient consideration for the promise of the other creditors to do the same. *Norman v. Thompson*, 4 Excheq. 755. It should make no difference in this aspect of the question, whether the parties agree to do or to forbear, to relinquish a right or waive an obligation. The weight of authority accordingly is that the subscribers to a charitable or public purpose, are bound to pay the amount of their subscription although they may have received nothing for it, because each promises in the expectation that the promise of the others will be fulfilled; and if the promisee does not give value, he is a trustee for those who do. *Stewart v. The Trustees*, 2 Denio, 413, 417; *Walkins v. Eames*, 9 Cushing, 557; *Cross v. The Pinkneysville Mill Co.*, 17 Illinois, 54; *McDonald v. Gray*, 11 Jones, 508; *Thompson v. Page*, 1 Metcalf, 565; *Ives v. Stirling*, 6 Id. 310; *Norton v. Janvier*, 5 Harrington, 346; *Caul v. Gibson*, 5 Barr, 416; *George v. Harris*, 4 New Hampshire, 533; *The Society in Troy v. Perry*, 6 Id. 164; *The Troy Academy v. Wilson*, 24 Id. 189; *Gettling v. Mayhew*, 6 Maryland, 113; *Cross v. Jackson*, 5 Hill, 478; *Comstock v. Howd*, 15 Michigan, 237. *The Trustees v. Robinson*, 21 New York, 234; *Smith v. Gowes*, 2 Duvall, 17. Mutual promises are considerations for each other, and the case is the same in principle when the promises, instead of being interchanged, are made to some one who is designated as the common recipient. *Underwood v. Waldron*, 12 Michigan, 73. A written agreement to contribute to a public dinner, may consequently be enforced by a suit in the name of a subscriber appointed orally to collect the money. *Comstock v. Howd*. In *Cross v. Jackson*, an agreement by a number of persons to unite in establishing a ferry, and pay the sums set opposite to their names to those who might subsequently be elected as trustees, was said by Cowen, J., to be virtually a promise to pay money to A., or to any one whom he might name in consideration of something done or promised to be done by B., which was unquestionably good under the authority of *Watson v. McLaren*, 19 Wend. 557.

There are, however, numerous decisions that a subscription for a common object cannot be enforced as between the parties, although it may be binding in favor of a third person who supplies materials or does work on the faith of the promise of the subscribers. *Ryan v. Goodman*, 5 Pick. 228; *Merrick v. French*, 2 Gray, 420; *The Phillips' Limerick Academy v. Davis*, 11 Mass. 113; *Farmington v. Allen*, 14 Id. 172; *The Bridge-water Academy v. Gilbert*, 2 Pick. 579; 1 Parsons on Contracts, 377; *Stewart v. The Trustees of Hamilton College*, 2 Denio, 405. The question underwent an elaborate examination in *Stewart v. The Trustees*, where Chancellors Walworth and Porter, one of the senatorial members, arrived at opposite conclusions; one relying on the common law rule that the consideration must move from the plaintiff, and the other



on the equitable principle that when a contract between two persons results in a duty to a third, it may be enforced by the latter. The result was a reversal of the judgment which had been entered for the plaintiff in the court below, and when the case subsequently arose in *The Trustees v. Stewart*, 5 Comstock, 81, the court gave judgment for the defendant. It was said that a promise to pay a sum certain to the trustees of a literary or charitable institution, was not a request to them to expend the money for the purpose before it was received, and that such an outlay would not be a consideration for the promise.

It is, however, well established that the court will not examine whether an act done in pursuance of a promise is beneficial to the promisor or hurtful to the promisee. *Dutton v. Poole*, 1 Ventris, 318. A promise that, if A. will expend money for a particular purpose, he shall be repaid, becomes binding as soon as the money is laid out, in the way prescribed. If a subscription to erect a church or college were a *nudum pactum*, in the first instance, it would be too late to allege the want of consideration after the parties had entered upon the execution of the design which it was intended to promote. *Watkins v. Eames*, Cushing, 537; *The Wayne Institution v. Smith*, 36 Barb. 575; *Eichsheimer v. Van Antwerp*, 13 Wisconsin, 546; *Pryor v. Carr*, 2 Illinois, 292; *The Ohio College v. Love*, 16 Ohio, N. S. 20.

A debt due to one man obviously cannot sustain a promise to another, consistently with the doctrine that the consideration must move from the promisee. But there is another reason why the mere existence of an antecedent debt is not a sufficient basis for a new obligation. We have seen that a promise is not binding unless the promisee does or agrees to do something on the faith of the undertaking of the promisor. And as this cannot be true of a past transaction, it will not serve as the consideration for a promise. *Livingstone v. Rogers*, 1 Caines, 583. In *Livingstone v. Rogers*, the court held, that in assumpsit on mutual promises, they must be laid in the declaration as concurrent. A count alleging that the defendant afterwards, to wit, on the same day, undertook and promised, was bad, and the contract it set forth invalid.

In applying this rule the court will not consider the fitness of the promise, or whether it is dictated by motives of gratitude or justice. An agreement to give \$500 for goods which are not worth fifty is valid in the absence of fraud and undue influence, and the vendor will not be bound by a subsequent promise to compensate the purchaser. If a man who has received charitable aid agrees to reimburse the donor, the contract is invalid although the person who conferred the favor is, through a change of circumstances in need of assistance. The

promise may be evidence that the money was lent not given, but it will not impose a legal liability if none existed previously.

"A subsequent express promise," said Tindal, C. J., in *Kaye v. Dutton*, 7 M. & G. 807, "will not convert into a debt that which is not in itself a legal debt apart from the promise." So in *Ware v. Adams*, 24 Maine, 17, the court said that "a past benefit, conferred upon sufficient inducement, and without any design or expectation of remuneration, does not impose any moral or legal obligation upon the party receiving it, and cannot, therefore, support a subsequent promise of compensation made by him;" and it results from the same principle that assumpsit will not lie on a promise to repay the plaintiff money which he has expended for the benefit of the defendant, but without the privity or request of the latter. *West v. West*, 1 Rolle Abridg. 11.

The rule was applied by Lord Denman, in *Roscorla v. Thomas*, 3 Q. B. 234. The declaration averred that in consideration that the plaintiff had bought a certain horse from the defendant at his request, the defendant undertook and promised that the horse was sound. A verdict having been rendered for the plaintiff the defendant moved to arrest the judgment on the ground of the insufficiency of the consideration. In granting the motion, Lord Denman held the following language:—"It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be co-extensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an *implied* promise by the defendant that the horse was sound, or free from vice. But the promise, in the present case, must be taken to be, as in fact it was, express; and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will, nevertheless, support an express one. And we think that it will not. The cases in which it has been held, that under certain circumstances, a consideration insufficient to raise an implied promise, will nevertheless support an express one, will be found collected and reviewed in the note [a] to *Wennall v. Adney*, 3 Bosanq. & Pul. 249, and in the case of *Eastwood v. Kenyon*, 11 Adolph. & Ellis, 438. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed, inapplicable to the present, which appears to us to fall within the

general rule, that a consideration past and executed, will support no other promise than such as would be implied by law. The rule for arresting the judgment upon the first count, must, therefore, be absolute."

In *Ehle v. Judson*, 24 Wend. 97, the transfer of a bargain for the sale of land was, in like manner, held not to be a consideration for a promissory note, because there was no valid agreement on the part of the owner of the land to convey, and the services of the plaintiff in obtaining his consent had not been performed, at the request of the defendant. Bronson, J., said the note was for a past or executed consideration. It was to compensate the plaintiff for what he had done in negotiating for the farm, and obtaining better terms than the owner had previously offered to the defendant. This did not constitute a good consideration. The plaintiff did not act for the defendant, but for himself, and the right which he transferred was invalid under the statute of frauds, and not binding even as an honorary obligation. Services voluntarily rendered, though they might be beneficial to another, imposed no legal obligation upon the party benefited. *Bartholomew v. Jackson*, 20 Johns. R. 28. The services must be rendered upon request; *Dunbar v. Williams*, 10 Id. 259; and in counting upon a past consideration, a request must, in general, be alleged; *Comstock v. Smith*, 7 Id. 87; *Parker v. Crane*, 6 Wendell, 647. It was not necessary that there should be direct evidence of a request. This, like most other facts, might be established by presumptive evidence; and the beneficial nature of the services, though not enough when standing alone, might be very important in a chain of circumstances tending to establish the presumption, 1 Saund. 264, n. 1; *Oatfield v. Waring*, 14 Johns. R. 188. See, also, *Doty v. Wilson*, Id. 378. In the case under consideration, the services were not beneficial to the defendant, and besides, they were not and could not have been rendered upon request. Swift was not acting for the defendant in the negotiation with Blatherwick, but for himself."

The plaintiff had often failed upon an express promise, in much stronger cases. In *Hunt v. Bate*, Dyer, 272, the plaintiff had, without request, become bail for the defendant's servant, who was imprisoned, to the end that he might go about his master's business; and the defendant afterwards promised to indemnify the plaintiff. After verdict upon this promise, the judgment was arrested, because, as the court said, "there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and main-prize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head." In *Freer v. Hardenburgh*, 5 Johns. R. 272, the plaintiff had, without re-

quest, made valuable improvements upon the defendant's land, and the defendant afterwards promised to pay for those improvements; but the promise was held to be *nudum pactum*, and judgment was rendered for the defendant. The case of *Smith v. Ware*, 13 Johns. R. 257, was also upon an express promise, and equally decisive against maintaining the action.

A similar view was taken in *Smith v. Ware*, 13 Johns. 257, of a promise to make good a deficiency in the quantity of land which the defendant had sold and conveyed to the plaintiff; and the court cited and relied on the rule laid down in the note to *Wennall v. Adney*, that an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision.

It is well established in accordance with this doctrine, that where no obligation exists none will be imposed by a subsequent express promise. *Ehle v. Judson*, 24 Wend. 97; *Uplike v. True*, 2 Beasley, 180; *Schnell v. Nell*, 17 Indiana, 29. And it results from the same principle, that in the absence of a new and distinct consideration such a promise will not vary or enlarge an existing liability. *Shepard v. Rodes*, Rhode Island, 470; *Wiggins v. Keizer*, 6 Indiana, 252; *Eukin v. Fenton*, 15 Id. 59; *Davison v. Davison*, 12 Iowa, 512; *Hatchell v. Odom*, 2 Dev. & Bat. 302; *Hunt v. Bate*, Dyer, 272 a; *West v. West*, 1 Rolle's Abridgment, 11; *Jeremy v. Goochman*, Cro. Eliz. 442; *Docket v. Vogel*, Ib. 885; *Brown v. Crump*, 1 Marsh, 567; *Hopkins v. Logan*, 5 Meeson & Welsby, 246; *Thornton v. Jenyns*, 1 M. & G. 166; *Kaye v. Dutton*, 7 Id. 807; *Jones v. Shorter*, 1 Kelly, 294; *Carson v. Clark*, 1 Scam. 113; *Frer v. Hardenburgh*, 5 John. 272; *Comstock v. Smith*, 7 Id. 81; *Bartholomew v. Jackson*, 20 Id. 28; *Geer v. Archer*, 2 Barb. 420; *Lyon v. Alvord*, 18 Conn. 66; *Jackson v. Jackson*, 7 Ala. 791; *Colcord v. The Louisville Railroad Company*, 1 Strobbart, 329; *Snevily v. Reed*, 9 Watts, 196; *Ware v. Adams*, 24 Maine, 177; *Woodburn v. Renstraw*, 32 Missouri, 397; *McDugald v. McPadgin*, 6 Jones, 89; *Fulke v. Fulke*, 7 Jones, 497. The test said Battle, J., in *Fulke v. Fulke*, is to be found in the inquiry whether there was any benefit to the party promising, or loss to the other party, when the promise was made or resulting subsequently from the promise.

When, therefore, the contract set forth in the declaration is on a past consideration, it will be invalid whether the promise is express or implied, unless the case be one where the law would imply such a promise as the plaintiff has alleged, although none was made by the defendant. *Bailey v. Bussing*, 29 Conn. 1. In other words, the promise must,

under these circumstances, be a legal consequence of the facts, which are relied on as constituting the consideration for the promise. *Atkinson v. Stevens*, 7 Excheq. 567; *Rann v. Hughes*, 7 Term, 350; *Clark v. Small*, 6 Yerger, 418; *Tryon v. Mooney*, 19 Johnson, 358; *Hawley v. Farrar*, 1 Vermont, 420. The rule has been applied under a great variety of circumstances. A warranty given by the vendor subsequently to the sale, is as much without consideration as if it proceeded from a person who was not concerned in the contract or with the chattels sold. *Roscorla v. Thomas*; *Hoggins v. Plympton*, 11 Pickering, 97; *Williams v. Hathaway*, 19 Id. 387; *Bloss v. Küttridge*, 5 Vermont, 28. And for the same reason, an undertaking by a landlord, subsequently to the lease, that he had power to let the premises for the purpose for which they were taken, or that the possession of the tenant shall not be disturbed, cannot be enforced for want of a sufficient consideration. *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 Id. 790; *Proctor v. Keith*, 12 B. Monroe, 252. Nor is a subsequent promise more effectual in increasing the amount than in varying the nature of the liability growing out of any past transaction. Thus, where a contract of sale has been brought to a conclusion, the liability of the purchaser will not be carried beyond the stipulated value of the property sold, by an express promise for the payment of an additional sum, even when induced by a complaint as to the hardship or inadequacy of the bargain, and put in the form of a promissory note. *Smith v. Ware*, 13 Johns. 257; *Greer v. Archer*, 5 Barb. 420; *Williams v. Hathaway*, 19 Pick. 387. And although where the promise and consideration are cotemporaneous, the former is the measure of value of the latter; *The Union Bank v. Gray*, 5 Peters, 99; *Sawyer v. Vaughan*, 25 Maine, 367; *Lawrence v. McCalmont*, 2 How. 426; *Clarke v. McFarland*, 5 Dana, 45; *Hubbard v. Coolidge*, 1 Met. 84; *Nellis v. De Forrest*, 16 Barb. 62; yet, where the promise is subsequent, the rule is reversed, and while there can be no recovery unless the consideration possesses some value, the damages will be measured by what it is worth. *Ehle v. Judson*, 24 Wend. 97. A release executed by one party on the faith of a promise of compensation made by another, is a valuable consideration in the absence of fraud, whether the debt or demand released, is or is not valid; *Russell v. Cook*, 3 Hill, 524; *Clarke v. Sigourney*, 17 Conn. 511; *Stoddard v. Mix*, 14 Id. 12; *Sawyer v. Vaughan*, 22 Maine, 337; *Titus v. Ash*, 4 Foster 319; but where a past release is relied on as the consideration for a subsequent promise, the declaration must set forth some actual right or interest, to which the release was applicable; *Kaye v. Dutton*, 7 M. & G. 807. (See 2 Leading Cases in Equity, 416, 3 Am. ed.; *Edwards v. Baugh*, 11 M. & W. 641.)

As a contractor cannot enlarge his liability by a subsequent promise, so he will not be discharged by a promise not to enforce the contract.

1 Smith's Leading Cases, 574, 6 Am. ed.; *Fagg v. Hambel*, 21 Iowa, 140; *Shirley v. Harris*, 3 McLean, 330. Such, at least, is the rule when the contract is executed by the passage of the consideration. *Foster v. Dawber*, 6 Exchequer, 839. When, however, it is merely executory, or in other words, when nothing has been done under it on either side, it may be varied or rescinded before breach by mutual assent. For as the obligation of the contract grows out of the promises made on either side, it may be dissolved in the same way. *Foster v. Dawber*, 1 Smith's Leading Cases, 576; Byles on Bills, 153, 6 Am. ed.; *Hill v. Smith*, 34 Vermont, 535.

A promise to pay an additional sum for work which the plaintiff has already agreed to perform, may accordingly be valid if the plaintiff proceeds on the faith of the promise. *Munroe v. Perkins*, 9 Pick. 238; *Lattimore v. Harsen*, 14 Johnson, 331; *Ludwig v. Thurston*, 6 Ohio, N. S. 1; *Holmes v. Doane*, 9 Cushing, 139; *Moore v. The Detroit Works*, 14 Michigan, 266. In *Lattimore v. Harsen*, the court said that if the promise had not been given, the contractor would probably have refused to complete the building, and his going on was therefore a sufficient consideration for the promise. A promise to indemnify the plaintiff against the liability which he had incurred by becoming surety for an administrator was sustained in like manner in *Carroll v. Nixon*, 4 W. & S. 517, because the plaintiff might otherwise have relieved himself from liability, by requiring the principal to give counter security, or deliver the assets to him for safe keeping; and the same point was decided in *Drury v. Fay*, 14 Pick. 326.

It is, however, established that the consideration must not only exist, but be adequate to sustain the promise; and the better opinion would consequently seem to be that a failure to do that which the plaintiff has agreed to perform and cannot omit without a breach of contract, is not a sufficient consideration for a new or distinct promise. No one should be allowed to found a right upon his own wrong, or make the violation of one agreement the binding cause of another. *Colcock v. The Louisville Railroad Company*, 1 Strobbart, 329; *Silk v. Myrick*, 2 Campbell, 317; *Harris v. Carter*, 3 Ellis, Bl. 559; *Fisterman v. Parker*, 10 Iredell, 474. *Reynolds v. Nugent*, 25 Indiana, 328. A promise to pay for the surrender of that which cannot legally be withheld is a *nudum pactum*; *Crosby v. Hood*, 2 Selden, 369; and this is equally true where the consideration of the promise is an act to which the promisee is already bound. *Shadwell v. Shadwell*, 9 C. B., N. S. 159, 178; *Collins v. Godfrey*, 1 B. & Ad. 949; *Goodwin v. Hallett*, 25 Vermont, 396. But the principle applies to vested rights and obligations perfected by the receipt of value; and the parties to an executory agreement may obviously rescind it and substitute another. *Foster v. Dawber*, *Moore v. The Detroit Works*, 14 Michigan, 266.

The rule that a subsequent promise will not impose a liability, meets with another exception where the defendant was originally bound, and has since been discharged by the act of the law, because he may then waive the benefit of an exception introduced for his benefit. A debt which has been barred by a bankrupt or insolvent law, or by the statute of limitations, may consequently be revived by a new promise. *Wen-nall v. Adney*, 3 Bos. & Pul. 249; *Kingston v. Wharton*, 2 Serg. & Rawle, 208; *Field's Estate*, 2 Rawle, 351; *Maxim v. Morse*, 8 Mass. 127; *Yates v. Hollingsworth*, 5 Harris & J. 216; *Walbridge v. Harroon*, 18 Verm. 448; *The Farmers' & Mechanics' Bank v. Flint*, 17 Id. 508, 1 Smith's Leading Cases, 876, 968, 6 Am. ed.; *Turner v. Chrisman*, 20 Ohio, 352. The promise may fall short of the original obligation and be qualified where that was absolute, but it cannot impose a new or different liability. A promise by a bankrupt to pay when able, is accordingly binding if he has the necessary means, but a pecuniary demand will not be revived by a promise to pay in goods or services. *Reeres v. Hearne*, 1. M. & W. 223; *Earle v. Oliver*, 1 Exchequer, 71; 1 Smith's Leading Cases, 6 Am. ed.

Another exception to the rule may arise where the plaintiff has sustained a detriment, or conferred a benefit on the defendant at the request of the latter, but under circumstances which do not give rise to an implied promise; *Kaye v. Dutton*, 7. M. & G. 807, 816; and the defendant may then bind himself by an express promise, made when the circumstances have undergone a change, or the disability which prevented the obligation from arising is removed. *Fleight v. Fleight*, 1 H. & C. 718. A promise by a man who has been restored to reason to pay for services rendered while he was insane, is within this principle, and so is a promise by a woman, after the death of her husband, to make compensation for work done or money lent at her request during coverture. *Lee v. Muggeridge*, 5 Taunton, 436; *Hemphill v. McClinans*, 12 Harris, 367; *Wilson v. Burr*, 25 Wend. 386; *Goulding v. Davidson*, 26 New York, 604. For when the law would imply a promise, if the party were able to contract, he may bind himself by an express promise on becoming *sui juris*. This would seem to be the true foundation of the doctrine, and not that of moral obligation on which it is sometimes based. *Paul v. Stackhouse*, 2 Wright, 302; *Hatchell v. Odom*, 2 Dev. & Bat. 302. A woman who has regained her freedom of action is obviously entitled to waive the disability imposed for her protection during coverture. The danger incident to oral evidence does not affect the principle, and may be guarded against by requiring the promise to be in writing. It is not material in this aspect of the question whether the consideration moves to the *feme covert*, or to some one else whom she desires to benefit, and a woman may consequently be bound by a promise to pay a note given as security for money ad-

vanced to her husband. *Vance v. Wells*, 8 Alabama, 399. In this instance however the wife had a separate estate, which would have been liable in equity, *Forrest v. Robinson, Exec'r*, 4 Porter, 44; *Sadler v. Houston*, Id. 208, 1 Leading Cases in Equity, 505, 535, 3 Am. ed., and might, therefore, with more reason, be made responsible at law.

These decisions are a natural sequence from the doctrine that every one may waive a defence introduced for his benefit. The English courts however hold, that a contract made during coverture being merely void, cannot be ratified by a subsequent promise, and the point has been decided in the same way in North Carolina. *Eastwood v. Kenyon*, 11 A. & E. 438, *Beaumont v. Reeves*, 8 Q. B. 483; *Fulton v. Reid*, 7 Jones 269. In *Latouche v. Latouche*, 3 H. & C. 576, a promissory note given by a married woman for advances made to her husband, was, however, said to be a good consideration for another note, made after his death, because her separate estate was bound and the equitable obligation upheld the promise. A promise to pay, or make compensation for value actually received under an agreement which is invalidated by a statute, though not contrary to the moral law, may be placed in the same category. A usurious contract is not merely voidable, but so entirely void, that it cannot be ratified by the most express agreement. This is simply because the contract is prohibited, and no remedy can be had in contravention of the rule. If, however, the parties agree to rescind the contract, the statute is no longer applicable, and a promise to return the amount actually received may be valid. *Goulding v. Davidson*, 26 New York, 604, 611; *Hammond v. Hopkins*, 13 Wend. 511; *Miller v. Hull*, 4 Denio, 104; see *Fleight v. Reid*, 1 H. & C. 718. This has been said to depend on the moral obligation of the borrower to reimburse the lender. But it properly falls under the rule that an express promise may revive a precedent good consideration, which might have been enforced through an implied promise, but for the intervention of some positive rule of law (post, 199); see *Fleight v. Reid*, 1 H. & C. 703, 716. In like manner, a subsequent promise of payment may remove the disability attending on a sale made on Sunday, and render the purchaser answerable, not for all that he stipulated to buy, but for what he has had and enjoyed. The liability grows out of, and is coextensive with the past transaction, and will be measured by it, and not by the terms of the promise; *Earle v. Oliver*, 2 Excheq. 71; 1 Smith's Leading Cases, 866, 6 Am. ed.

Whether the receipt of goods under a contract which is invalidated by the statute of frauds, makes the purchaser answerable for the value as fixed by the contract, or only for what the goods are reasonably worth, is a point about which the authorities do not agree. See *Lockwood v. Barnes*, 3 Hill, 131; *King v. Welcome*, 5 Gray, 41; *Wilson v.*



*Rea*, 13 Indiana, 1; *Pearce v. Paine*, 28 Vermont, 34; *Shute v. Dorr*, 5 Wend. 204; *Farnham v. Bryan*, 22 Maine, 475; *Broadwell v. Dittman*, 2 Denio, 87; *Stone v. Dennison*, 13 Pick. 1; 1st Smith's Leading Cases, 546, 6th Am. ed; although the better opinion would seem to be, that the recovery should be limited to the actual value of the property, and if so it cannot seemingly be carried further by a subsequent promise.

A subsequent promise, may also be material where the obligation imposed by a past transaction, although real, is uncertain, and cannot be reduced to certainty without an express promise. In *Lampleigh v. Brathwait*, Hobart, 105; a declaration averring that the defendant had slain one Patrick Mahone, and afterwards requested the plaintiff to do his endeavor to obtain a pardon from the king, and thereupon the plaintiff in pursuance of the said request, did labor, and endeavor to obtain the said pardon by riding and journeying to Boston, where the king then was and back again to London, in consideration whereof the defendant promised to pay the plaintiff £100, was held to disclose a good cause of action, because the promise related back to the request. In like manner where a promise was made to pay the plaintiff twenty pounds, in consideration of an antecedent marriage contracted at the request of the defendant, the court held the agreement valid; *Dyer*, 272, b. pl. 32; *Marsh v. Knavenford*, Cro. Eliz. 259. These decisions appear to be sound, although the point was determined the other way in *Sandbill v. Jenney*, *Dyer*, 272, b, in notis. A man obviously can not recover on a *quantum meruit* for marrying his wife, from the want of any sufficiently exact measure of the damages, and the promise was consequently an essential element, without which the contract could not have been enforced. *Waters v. Howard*, 8 Gill, 262. In *Maryhouse v. Calvin*, 9 English, L. & E. 107, 136, a promise to a husband before marriage, to "notice his wife in the will of the promisor, but to what amount I cannot say," was held to fail for uncertainty, but might, no doubt, have been rendered binding by a subsequent declaration of the amount due.

In such instances the only element wanting to the contract is certainty, but there are others where an act done in pursuance of a request which does not imply a promise, may acquire the obligation of a contract through a subsequent promise, *Kaye v. Dutton*, 7 M. & G.; *Paul v. Stackhouse*, 2 Wright, 302, 304; 1 Smith's Leading Cases, 267, 6 Am. ed. A request that credit shall be given to another in the shape of a sale or advance, does not imply a promise to be answerable for the debt, because the natural inference is that the vendor is to get his money from the purchaser, *Bushnell v. The Bishop Hill Colony*, 28 Illinois, 204; *Clarke v. Russell*, 7 Cranch, 69. Under these circumstances a subsequent promise, may, it has been said, bind

the promisor as a surety or guarantor. *Paul v. Stackhouse*. In the cases where the point has actually arisen, the request was, however, such as to imply a promise, which the subsequent express promise reduced to certainty, or else there was some act done or promise made on behalf of defendant, which he subsequently ratified. Thus in *Paul v. Stackhouse*, the plaintiff advanced the money on the faith of the assurance of the borrower, that the defendant would give a note as security, and when the latter subsequently put his name to the instrument the contract became his own.

An act done at the request of another will not be a consideration, unless the intention was to charge him, or his credit was the inducement to the act. A letter stating that a charitable institution is in need of funds, and asking the person to whom it is addressed to give the amount required, obviously would not be a sufficient foundation for a promise. And this is equally true of a request that goods shall be sold to a third person, unless it is so worded as to be in effect a guaranty of the debt. See *Clarke v. Russell*, 7 Cranch, 69. When the relation between the parties is one of charity or beneficence it cannot be made legally obligatory by the most express promise. *Honor v. Moore*, 8 Ohio, N. S. 239. A subsequent engagement may, however, be convincing as an admission when it would fail as a contract, and when it is doubtful whether the defendant intervened as a disinterested friend or neighbor, or as a guarantor, his promise to pay the debt may properly be allowed to turn the scale.

A subsequent promise may, therefore, have a two-fold operation; first, as tending to show that the parties were mutually bound, and so understood it from the outset. *Gale v. Goldsburg*, Dyer, 272, in notis; *Hatch v. Purcel*, 1 Foster, 544; *Wilson v. Edwards*, 4 Id. 517; and next when this is proved or conceded, by reducing the agreement to order and certainty, and affording a measure of the damages. But it would seem that an act done voluntarily, without a request, is not a consideration even when it results in a benefit to the defendant, or relieves him from a burden which he would otherwise have to bear. Accordingly where the declaration alleged that in consideration that the plaintiff had previously sold and conveyed to the defendant a farm or lot of land, the defendant then and there undertook and promised, the judgment was arrested after verdict. *Comstock v. Smith*, 7 Johnson, 87. The court said that if it had been averred that the defendant had accepted the deed, or entered into possession of the land conveyed, his assent might have been equivalent to a request, but that such an inference could not be drawn from the facts alleged by the plaintiff.

So in *Mills v. Wyman*, 3 Pick. 207, where a son of full age, fell sick among strangers, and was supported at their expense till he died, the father was said not to be bound by a promise of repayment, which he

had given on hearing of the circumstances, after the death of his son. And in *Dearborn v. Bowman*, 3 Metcalf, 155, recovery was refused on a promise to make a compensation for past services rendered by the plaintiff, in circulating political documents to aid in the election of the defendant, but without his assent or knowledge. "The rule of law," said the court, "seems now well settled, although it may have formerly been left in doubt, that the past performance of services, constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant. *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Dodge v. Adams*, 19 Pick. 429. As the services performed by the plaintiff were not done at the request of the defendant; as they were not done in the fulfilment of any duty or obligation resting on him; there was no consideration to convert the express promise of the defendant into a legal obligation."

It is well settled in accordance with these decisions that a service rendered voluntarily without a request, is not a consideration for a subsequent promise, unless the promisor accepts the benefit under circumstances which leave him free to refuse. *Balcom v. Craggin*, 5 Pick. 295; *Shepherd v. Young*, 8 Gray, 152; *Bartholomew v. Jackson*, 20 Johnson, 28; *Carson v. Clark*, 1 Scammon, 113; *Hutson v. Overturf*, Ib. 170; *Kinnersly v. Martin*, 8 Mis. 698; *Snevily v. Reed*, 9 Watts, 396; *Geer v. Archer*, 2 Barbour, 420; *Ingraham v. Gilbert*, 20 Id. 151.

A party may also be bound by a subsequent promise to make compensation for an unauthorized act done on his behalf. *Renan v. Hallows*, 16 Alabama, 73; *Ingraham v. Gilbert* 20 Barb. 151. It is a familiar maxim that a ratification relates back, and is equivalent to a prior command. A contract made officiously by a self-constituted agent, is consequently as valid when ratified by the principal, as if he had authorized it in the first instance. And he cannot entitle himself to the benefit without becoming liable to the burden.

A man who ratifies an unauthorized subscription in his name for stock, by a subsequent promise, is as much bound as if he had assented at the time. *Cowell v. The Philadelphia and Wilmington Railroad*, 4 Casey, 329. In like manner, an insurance effected without authority, may, when ratified, render the insured liable for the premium, or the insurers for the loss; *Lucena v. Crawford*, 1 Taunton, 325; *Sterling v. Vaughan*, 11 East, 619; *Fleming v. The Marine Ins. Co.*, 4 Wharton, 59; even when the ratification does not take place until after the loss occurs, *Hagedorn v. Oliverson*, 2 M. & S. 485; and the institution of the suit is the only evidence of the intention of the plaintiff to enforce the contract made on his behalf. *Fleming v. The Marine Ins. Co.* In like manner, a promise to reimburse another for money paid in discharge

of an obligation resting on the promisor, is, for all legal purposes, equivalent to a prior request. *Doty v. Wilson*, 14 Johnson, 378; *Hassenger v. Solms*, 5 S. & R. 478.

In *Doty v. Wilson*, the court held, that where the sheriff had been compelled to pay the amount of the debt in consequence of the escape of the debtor from custody under an execution, the act was done on behalf of the latter, and he was bound by a subsequent promise of repayment. When a man, said Thompson, C. J., "pays money for me without my request, and I afterwards agree to his act, this is equivalent to a previous request. The benefit to the defendant coupled with his express promise amount to a previous request, and adopt the payment as one made on his behalf, for which he is willing to be answerable." In *Smith v. Plummer*, 5 Wharton, 89, a contract made for the benefit of the defendants was held, in like manner, to have been ratified by their giving it in evidence as a defence to a suit brought contrary to its terms. In *Hassenger v. Solms*, 5 S. & R. 8, an agent who had taken up a note endorsed by his principal, contrary to the express orders of the latter, by giving a new note in his own name, was held entitled to enforce a subsequent promise of indemnity, which was said to operate as a ratification of the act of the agent. And while the unauthorized payment of a debt will not place the debtor under an obligation to the self-constituted agent, he cannot set it up as a defence to a suit brought by the creditor, without incurring a liability which may be enforced by an action for money paid, laid out, and expended. *Littleton v. Thompson*, 2 Beaseley, 274; *Carter v. Black*, 4 Dev. & Bat. 425; *Jones v. Broadhurst*, 9 C. B. 173; *Belshaw v. Bush*, 11 Id. 191; *James v. Isaacs*, 12 Id. 791; 2 Leading Cases in Equity, 231, 3 Am. ed.

The ratification need not be express; it may be implied from facts and circumstances, or even from the failure of the person for whose benefit the act is done to dissent when duly notified. *Bingham v. Peters*, 1 Gray, 139, 147. Silence, it has been said, may give consent, and a man who does not speak when the occasion requires it, will not be allowed to object subsequently. *Cowell v. The Philadelphia and Wilmington Railroad*, 4 Casey, 329. This is universally conceded when the defect consists in an excess and not in an entire want of power. *The Bank v. Combs*, 7 Barr, 543; *Bingham v. Peters*, and may be equally true when a stranger intervenes from motives of benevolence.

To make a ratification effectual, it must be of some act done or engagement made as agent for and on behalf of the person whom it is alleged to bind. See *Stevenson v. Newham*, 10 C. B. 713, 13 Id. 285; *Baron v. Denman*, 7 Excheq. 156; *Wilson v. Tummon*, 6 M. & G. 231; *Debolle v. The Pennsylvania Insurance Company*, 3 Wharton, 68; *Whitehead v. Peck*, 1 Kelly, 41; *James v. Isaacs*, 12 C. B. 91; *Railroad Com-*

*pany v. Gazzam*, 8 Casey, 430, 437; *Ehle v. Judson*, 2 Wend. 97; *Cummings v. Clapp*, 5 W. & S. 511; 1st Smith's Leading Cases, 587, 6 Am. ed. Or as the rule was stated in *Cummings v. Clapp*, the rule that a ratification is equivalent to a precedent authority, is applicable exclusively to acts done in the principal's name, otherwise an act confessedly tortious might be ratified by obtaining the sanction of him who has the right. In an anonymous case, Godbolt, 109, Anderson, C. J., said that a trespasser who takes the goods of a tenant without right, cannot rely on a subsequent warrant from the landlord. He must be bailiff at the time, and if he is not, a subsequent ratification will not render the distress valid.

It follows that when the plaintiff acts in his own behalf or by virtue of an independent right or title, the defendant will not be bound by a subsequent promise of compensation, even when the result of the transaction is to confer a benefit on him. If a man were, for instance, to build a house on the land of another without his consent, it might be altogether just for the latter to agree to pay what the building was worth; but the promise would, notwithstanding, be a *nudum pactum*. For, as the builder does not, under such circumstances, act as the agent of the owner, but in his own right, the case is not one where a ratification can take the place of a command. *Hunt v. Bate*, Dyer, 272; *Freer v. Hard-  
enburgh*, 5 Johnson, 272; *Ehle v. Judson*, 24 Wend. 97. If, however, the bailiff, or superintendent of a farm, should exceed the limits of his authority, by employing workmen to erect a barn or other structure on the land, the principal might be bound by a subsequent promise to indemnify the agent, or pay for the labor and materials expended in the erection of the building. In like manner a debtor cannot take advantage of the payment of the debt by a third person, unless it appears that the latter was acting as his agent. *Simpson v. Egginton*, 10 Exchequer, 845, 847. If, however, the act be done on behalf of the principal it need not be in his name, unless the circumstances render such a disclosure imperative. See *Lucena v. Crawford*, *Sterling v. Vaughan*, *Fleming v. The Marine Insurance Company* (ante).

It was long held that if a man who was bound in morals clothed the obligation with an express promise, the contract was valid and might be enforced by suit. *Hawkes v. Saunders*, 1 Cowper, 289; *Atkins v. Barnewall*, 2 East, 505; *Cooper v. Martin*, 4 Id. 76; *Wing v. Mill*, 1 B. & Ald. 104; *Lee v. Muggeridge*, 25 Taunton, 36; *Doty v. Wilson*, 14 Johnston, 378; *Willing v. Peters*, 12 S. & R. 177. The doctrine seems to have originated with Lord Mansfield, who was not inclined to pause for the want of a consideration, when the case was clear in other respects. "If," said he, in *Hawkes v. Saunders*, "a party is under a moral obligation which no court of law or equity can enforce, the honesty and rectitude of the thing are a consideration." This dictum which was

not necessary to the determination of the case in hand, where the antecedent obligation might have been enforced by a bill in equity, past into the current of decision and was generally accepted as law. *Trumbull v. Tilton*, 1 Foster, 128; *Cunningham v. Gavin*, 10 Barr, 366, 368; *Greeves v. McAllister*, 2 Binney, 591; *Montgomery v. Lampton*, 3 Metcalf, Ky. 519; *Stewart v. Eden*, 2 Caines, 150; *Doty v. Wilson*, 14 Johnson, 378; *Bentley v. Morse*, Ib. 468; *Glass v. Beach*, 5 Vermont, 475. In *Hemphill v. McClinans*, 12 Harris, 367, it was declared to be a familiar rule that an existing moral duty not enforceable by law is a sufficient consideration for an express promise; and in *Cunningham v. Gavin*, Bell, J., said that a benefit derived from the unsolicited services of another, creates a moral obligation of sufficient potency to sustain an express promise to make compensation. So in *Greeves v. McAllister*, 2 Binney, 591, the plaintiff and defendant were bail for the same person although in different suits, and the court held that the act of the former in pursuing and arresting the principal debtor who had made his escape, was a sufficient consideration for a promise by the latter to bear half the expense, although it appeared from the evidence that the plaintiff had acted for himself in making the arrest without communicating his intention to the defendant.

The doctrine was applied under a great variety of circumstances on both sides of the Atlantic. A father was under a moral obligation to maintain his child, and ought to compensate those who fulfilled the duty in his default. *Atkins v. Barnewall*, 2 East, 505; *Cooper v. Martin*, 4 Id. 76. The sheriff incurred a liability through the escape of the defendant in an execution, it was the duty of the latter to indemnify the sheriff. *Doty v. Wilson*, 14 Johnson, 378. A debtor who received a release in full in consideration of a partial payment, was morally bound to pay the residue of the debt when able. *Willing v. Peters*, 12 S. & R. 177; *Trumbull v. Tilton*, 1 Foster. A married woman to whom money was advanced to meet a pressing need, ought to refund it after the death of her husband, if she had the means. *Lee v. Muggeridge*, 5 Taunton, 36; *Vance v. Wells*, 8 Ala. 399; *Hemphill v. McClinans*, 12 Harris, 367. And if the parties who were under obligations of this or a like kind chose to ratify them by an express promise, it would be legally binding, and might be made the foundation of a recovery in damages.

The question arose in *Lee v. Muggeridge*, 5 Taunton, 10, on a promise by a widow to repay money which had been advanced, at her request, to her deceased husband during his life. It was contended on behalf of the defendant, that, as the contract was void when originally made, it could not be a consideration. Mansfield, C. J., however, said, that where a person is bound morally and conscientiously to pay a debt, a subsequent promise will give a right of action. There could be no

stronger moral obligation than that set forth on the record. The case was not legally distinguishable from that of *Barnes v. Hedley*, 2 Taunton, 184, where it had been held, that a promise to repay the amount originally advanced under a contract void for usury, was binding on the debtor, and might be enforced by suit. The rule for a new trial was accordingly discharged.

The merit of correcting this fallacy, seems to belong to the writer of the learned note in *Wennall v. Adney*, 3 Bos. & Pul. 247, 249. It was there shown that the cases where a part consideration had been upheld on the ground of moral obligation, really hung on a very different principle. They were all cases of a precedent consideration which would have given rise to an implied promise, but for the intervention of some positive rule of law, which might be waived by the party for whose benefit it was introduced. An express promise might revive a good or valuable consideration, which had been barred by a statute or the lapse of time, but it would not give validity to a moral obligation when there was no consideration from which an obligation could legally arise. This view was adopted in *Mills v. Wyman*, 3 Pick. 207. It appeared at the trial, that the defendant's son was ill and in distress away from home, and had been relieved by the plaintiff, who procured a nurse and physician, and supplied his wants until he grew well, and the defendant subsequently wrote a letter to the plaintiff, promising to repay the expense which the latter had incurred.

The judgment was pronounced by Shaw, C. J., in the following language. "It is said, a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down this rule broadly; but upon examination of the cases, we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtor from being compelled to pay. In all these cases, there was originally a *quid pro quo*; and according to the principles of natural justice, the party receiving ought to pay; but the Legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. The promises, therefore, have a sound legal

basis. They are not promises to pay something for nothing; not naked facts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony short of that which would reduce his son to the necessity of seeking public charity.

“Without doubt, there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

“A deliberate promise in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the



courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

“These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a valuable consideration has existed.

“A legal obligation is always a sufficient consideration to support either an express or implied promise; such as an infant’s debts for necessities, or a father’s promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world’s business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow that his promise founded upon such a debt, has no legal binding force.”

It was said in like manner, in *Hatchell v. Odom*, 2 Dev. & Bat. 302, that if a duty is sufficiently clear and definite to be a subject of legal cognizance, it will be enforced through the fiction of an implied promise, if it is not, an express promise will not bring it within the reach of the law. This is the only practical criterion, because there are a multitude of moral obligations which must be left to the interior forum, as being too refined and delicate to be investigated judicially, or made the ground of a recovery in damages.

The question arose not long afterwards in *Eastwood v. Kenyon*, 11 A. & E. 438, where a declaration alleging the expenditure of money by a guardian in improving the estate of his ward, her subsequent marriage to the defendant, through which he was benefited to the full extent of the money so laid out, and a promise of repayment on his part, was held bad after verdict as not showing a consideration.

The doctrine of *Lee v. Muggeridge*, that a moral obligation will support a promise, was condemned by Lord Denman as having no place in English law; and he pointedly observed that if it were true every promise would be legally binding, because every promise carries with it a moral obligation.

The result will be the same whether the alleged obligation is to make compensation for a service or repair a wrong; and in *Beaumont v. Reese*, 8 Q. B. 485, the court held that the defendant was not bound by a promise to pay a sum annually for the support of a woman whom he had seduced.

It is generally held, in accordance with these decisions, that to render a subsequent promise valid, some act must have been done or service rendered on the faith of an express or implied request, and that when this element is wanting, it will not be enough to show that the de-

defendant was morally bound to remunerate the plaintiff, and ratified the obligation by an express promise. *Honor v. Moore*, 8 Ohio, N. S. 238; *Updike v. True*, 2 Beaseley, 151; *Nightingale v. Barney*, 4 Greene, Iowa, 106; *Paul v. Stackhouse*, 1 Wright, 302; *Geer v. Archer*, 2 Barb. 420, 424; *Dearborn v. Bowman*, 3 Metcalf, 155; *Wiggins v. Reezer*, 6 Indiana, 252; *Eakin v. Fenton*, 15 Id. 59; *Davidson v. Davidson*, 12 Iowa, 512.

In *Dearborn v. Bowman*, the court said, that it is now well settled, if it was formerly in doubt, that a past service is not a consideration even for an express promise, unless it was performed at the express or implied request of the defendant, or in pursuance of some duty or liability resting on the defendant, and from which he was relieved or exonerated by the act of the plaintiff. See *Ingraham v. Gilbert*, 20 Barb. 157; *Thorn v. Deas*, 4 Johns. 84; *Watkins v. Halstead*, 2 Sand. Sup. C. R. 311; *Cook v. Bradley*, 7 Conn. 57; *Loomis v. Newhall*, 15 Pick. 159; *Lodge v. Adams*, 19 Id. 429; *Kinnersly v. Morton*, 8 Mo. 698; *Bates v. Watson*, 1 Sneed, 376; *Hilt v. Robinson*, 21 Ala. 106.

In like manner a promise by a child to maintain an aged parent, or by a parent to compensate the care and services that have been bestowed on a sick or helpless child, cannot be enforced on the ground of morals, where there is no legal liability aside from the promise. *Mills v. Wyman*, 7 Pick. 207; *Davidson v. Davidson*, 12 Iowa, 512; *Cook v. Bradley*, 7 Conn. 107. If a vendor who has sold without warranty is morally bound to indemnify the purchaser for a defect which frustrates the object for which he bought, the duty is not one which the law will enforce even when fortified by an express promise. *Roscorla v. Thomas*, 3 Q. B. 34; *Greer v. Archer*, 2 Barb. 420; *Williams v. Hathaway*, 19 Pick. 387. And although the breach of a promise to repay a benefactor who stands in need, may be justly condemned as a mark of ingratitude and bad faith, it cannot be made the foundation of recovery in assumpsit. *Honor v. Moore*, 8 Ohio, N. S. 238.

It was held at one period that an insolvent debtor who has been discharged or released in consideration of a partial payment, is under a moral obligation that will uphold a subsequent promise to pay the residue. *Willing v. Peters*, 12 S. & R. 177; *Trumbull v. Tilton*, 1 Foster, 128. But these cases are now overruled by others which establish that when a debt is extinguished by a release or through an accord and satisfaction, it ceases to exist for all purposes, and cannot be made the basis of a contract. *Sneviley v. Read*, 9 Watts, 401; *Valentine v. Fortner*, 1 Metcalfe, 522; *Stafford v. Bacon*, 1 Hill, 535; *Shepherd v. Rhodes*, 7 Rhode Island, 470; *Warren v. Whitney*, 24 Maine, 561; *Montgomery v. Lampton*, 8 Metcalf, Ky. 519; *Wright v. Clarke*, 34 Mississippi, 116. The rule applies even when the satisfaction is nominal or illusory by the arrest of a debtor under a *capias ad satisfaciendum* from which

he is discharged; *Wright v. Clarke*; or the note of a third person which is not paid; *Sneviley v. Read*, 9 Watts, 401. It was indeed said in *Trumbull v. Tilton*, that whether the bar arises under a certificate in bankruptcy or a release, it is equally within the control of the debtor, and may be waived by him, but there is an obvious distinction between the extinguishment of a debt voluntarily and by the act of the law. *Shepherd v. Rhodes*, 7 Rhode Island, 470; *Montgomery v. Lampton*.

The rule that a past transaction will not sustain any promise which the law would not imply, cannot be evaded by the introduction of a nominal consideration, or of a consideration which is inadequate to the promise. *Shepherd v. Rhodes*, 7 Rhode Island, 470; *Schnell v. Schnell*, 17 Ind. 29. In *Shepherd v. Rhodes* a declaration averring that the plaintiff had released the defendant who was then insolvent, and agreed to look solely to his assignee, and that the defendant subsequently, in consideration thereof, and of one dollar, promised to pay the debt, was accordingly held bad on demurrer as not disclosing a sufficient consideration; and the same view was taken in *Schnell v. Schnell*, of a promise by a husband to pay a legacy left by his wife, in consideration of one cent, of natural love and affection, and of the services which she had rendered to him during her life.

The enumeration of the instances in which an express promise will render a past transaction valid, would not be complete without adding, that if a man who is under an equitable obligation promises to fulfil it, the contract may, in some instances, be enforced by suit. *Greer v. Archer*, 2 Barb. 420; *Stewart v. Eden*, 2 Caines, 150; *Hudson v. Cutchen*, 8 Jones, 485; *Latouche v. Latouche*, 3 H. & C. 576. Accordingly, if the principal debtor promises the surety to discharge the debt when due, the latter may sue at once if the promise is not fulfilled, instead of waiting, as he otherwise would have been compelled to do until he had satisfied the obligation out of his own funds, and then bringing an action for money paid, laid out and expended. *Keller v. Rhoads*, 3 Wright, 513; *Stewart v. Eden*, 2 Caines, 150; *Smith v. Crocker*, 21 Pick. 241; *Haseltine v. Gill*, 11 New Hampshire, 390. In like manner an assignee of a chose in action who receives a promise of payment from the debtor, may enforce it by a suit in his own name, because the promise operates as a ratification of the equitable duty resulting from the assignment (ante, 145). *Crocker v. Whitney*, 10 Mass. 316; *Promelian v. Mauger*, 6 Harris, 169. Equitable in this sense is not, however, synonymous with just or equal, and denotes the existence of some right or obligation which a chancellor would enforce by a decree.

We have seen that an antecedent debt will not support any other promise than that which the law implies, to pay the debt on request, or according to the terms of the original agreement. To sustain a new and

distinct contract on such a basis, there must consequently be something more than the existence of the debt. *Rann v. Hughes*, 7 Term. 350; *Barnet v. Temple*, 4 Taunt. 117; *Rex v. Adams*, 9 Vermont, 233; *Russell v. Buck*, 11 Id. 166; *Phalon v. Stiles*, Ib. 82; *Shirley v. Harris*, 3 McLean, 330; *Gilman v. Kibler*, 5 Humph. 19; *Barker v. Bucklin*, 2 Denio, 45; *Jackson v. Jackson*, 7 Alabama, 791. In *Hopkins v. Logan*, 5 M. & W. 241, a declaration alleging that the defendant was indebted to the plaintiff on an account stated between them, and in consideration thereof promised to pay at a future day, was accordingly held bad on demurrer. For a like reason, a promise to pay one of three joint creditors his proportion of the amount due, is not a good cause of action (ante, 144); *Udakin v. Soper*, 1 Aikins, 287; although if the three met together and agreed with the debtor that each of them should have his share, the contract would no doubt be valid. A promise by the debtor to pay the debt to a third person, or by a third person to pay the debt, cannot therefore be enforced in the absence of a new consideration. *Barnet v. Temple*, 4 Taunton, 117; *Rex v. Adams*, 5 Vermont, 233; *Russell v. Buck*, 11 Id. 166; *Barker v. Bucklin*, 2 Denio, 45; *Blunt v. Boyd*, 3 Barb. 209; *Warren v. Batchelder*, 15 New Hampshire, 131; *Wilson v. Cowpland*, 5 B. & Ald. 228; *Blunt v. Boyd*, 3 Barbour, 209; *Lewis v. Smith*, 4 Florida, 47; *Salmon v. Brown*, 6 Blackford, 347. This is true even when the contract is put in the form of a promissory note, unless there is an express or implied agreement by the creditor to forbear until the instrument matures; *Crofts v. Beale*, 11 C. B. 172; *Mecorney v. Stanley*, 8 Cushing, 85; *Bingham v. Kimball*, 17 Indiana, 376; *Nelson v. Serle*, 4 M. & W. 175; which will, however, be implied if the instrument is payable at a future day, and given at the request of the debtor or on his behalf. *Baker v. Walker*, 14 M. & W. 465; *Jenneson v. Stafford*, 1 Cushing, 168; *Popplewell v. Wilson*, 1 Strange, 264; *Belshaw v. Bush*, 11 C. B. 195. See *Baillic v. Moore*, 8 Q. B. 489; *Wilson v. Rundell*, 20 Wend. 201.

A consideration may, however arise from a precedent debt, through the agreement of the parties to vary or suspend their rights, or the intervention of some positive rule of law. In *Lechmere v. Fletcher*, 1 Cr. & M. 623, the declaration averred that the defendant and one Fuljames were jointly indebted to the plaintiff for money advanced by him, that the right of action had been barred by the statute of limitations, and that the defendant subsequently promised to pay his proportion of the debt. The defendant produced the record of a former suit, on the original cause of action, in which a verdict and judgment had been entered in his favor on the general issue, and on a plea of the statute of limitations, and against Fuljames on the general issue; and relied on this and the alleged insufficiency of the declaration.

The court were however, of opinion, that the former recovery was not for the same cause of action, and that as the defendant could not take the case out of the statute against Fuljames, under the 9th Geo. IV., chap. 14, 1 Smith's Leading Cases, 861, 6 Am. ed., he might bind himself by a several promise. In this instance the original obligation was suspended by the statutory bar, and the case does not, therefore, conflict with the general rule, that a precedent debt is not a consideration for a promise differing from that which the law would imply.

It is, in like manner, well established, under the decisions in New York, Pennsylvania, and in the Supreme Court of the United States, that a promise by one of several co-contractors, may remove the bar of the statute of limitations as it regards him, without binding the others. 1 Smith's Leading Cases, 6 Am. ed., 895; *Bell v. Morrison*, 1 Peters, 351; *Palmer v. Dodge*, 4 Ohio, N. S. 21; *Levy v. Cadet*, 17 S. & R. 126; *The Exeter Bank v. Sullivan*, 6 New. Hampshire, 124; *Winchell v. Hicks*, 18 New York, 559.

In like manner if either party to an antecedent debt or obligation, agrees to vary his existing rights in consideration of something done or promised on the other side, or by a third person, the contract will be valid. The discharge of one demand is obviously a sufficient cause for the creation of another, as where A. agrees to release B., in consideration of an assumption of the debt by C. *Corbitt v. Cochran*, 3 Hill, S. C. 41; *Hopp v. Symonds*, 2 Chitty, 324; *Wilson v. Coup-land*, 5 B. & Ald. 228; *Peate v. Dickens*, 2 C. M. & R. 228; *Stoddard v. Mix*, 14 Conn. 12; *Clark v. Sigourney*, 17 Id. 511; *Corbet v. Cochran*, 3 Hill, S. C. R. 41; *Smith v. Weed*, 20 Wend. 184; *Thatcher v. Dinsmore*, 5 Mass. 29; *Foster v. Fuller*, 6 Ind. 58; *Stebbins v. Smith*, 4 Pick. 97; *Weld v. Nichols*, 17 Id. 538; *Saylor v. Mack*, 4 Blackford, 388.

In *Corbet v. Cochran*, where the defendant promised to pay the debt of a third person, in consideration that the latter should be exonerated, and the plaintiff thereupon credited the original debtor in full, and charged the amount in his books to the defendant; the court held that the promise was binding, and might be enforced in an action of assumpsit. So the plaintiff's promise to give a third person credit for £150, on an antecedent debt, is a valuable consideration for the defendant's promise to give the plaintiff a promissory note. *Peate v. Dickens*, 2 Cr. M. & R. 421. The onus is, however, under the circumstances, on the plaintiff, to show the consideration, which will not be inferred from the promise, and in *Caxon v. Chadley*, 3 B. & C. 591, a recovery was refused in a case nearly akin to *Corbet v. Cochran*, because the evidence did not show with sufficient clearness, that the assumption was to go in satisfaction of the previous demand. See

*Waggoner v. Gray's Administrator*, 2 Henning & Mumford, 603; *Ford v. Adams*, 2 Barb. 349.

The suspension of an antecedent right, although for a limited period, may be as effectual for the support of a new promise, as if it was extinguished. Such a consideration is well known to the law under the title of forbearance, as both good and valuable. *Goodman v. Simonds*, 20 Howard, 343, 370. A promise by the debtor, or by a third person, to pay the debt at a future day, if the creditor will wait till then, falls within this principle; *Jennison v. Stefford*, 1 Cushing, 168; *Hakes v. Hotchkiss*, 23 Vermont, 231; *Piat v. Humphrey*, 22 Conn. 317; *Martin v. Black*, 20 Ala. 309; *Tappan v. Campbell*, 9 Yerger, 436; *Marshall v. Birkinshaw*, 1 New. R. 172; *Payne v. Wilson*, 7 B. & C. 423; *Willetts v. Kennedy*, 3 Bing. 5; *Lemaster v. Burkhart*, 2 Bibb. 30; *Sage v. Wilcox*, 6 Conn. 81; *Wheeler v. Slocumb*, 16 Pick. 52; *King v. Upton*, 4 Maine, 589; *Watson v. Randall*, 20 Wend. 301; *Elting v. Vanderlyn*, 4 John. 231; *Allen v. Pryor*, 3 Marsh. C. C. 148; *Selvis v. Ely*, 3 W. & S. 420; *Sidwell v. Evans*, 1 Penna. 385; *Russell v. Babcock*, 2 Shepley, 138; *Colgin v. Henly*, 6 Leigh, 85; *Downing v. Funk*, 5 Rawle, 69; *Lowe v. Weatherly*, 4 Dev. & Batt. 209; and so, where the statutes against usury do not intervene, does a promise to pay a larger sum in consideration of delay in enforcing the payment of a smaller. It is from this cause that contracts for the payment of interest derive their validity, whether made by the parties, or implied by the law. And while a promise to pay an antecedent debt at a future day, is *prima facie* a *nudum pactum*; *Hopkins v. Logan* (ante, 204); it will be valid if put in the form of a note or bill, because the law implies an agreement to forbear until the instrument matures. *Baker v. Walker*, 14 M. & W. 465; *Walton v. Mascall*, 13 Id. 452. Forbearance to proceed against the debtor, will, moreover, uphold an agreement by a third person to be answerable as guarantor. *Walton v. Mascall*, 13 M. & W. 452; *Wilders v. Stevens*, 15 Id. 208; *Wheeler v. Slocumb*, 16 Pick. 52; *Silvis v. Ely*, 3 W. & S. 420; *Watson v. Randall*, 20 Wend. 201; *Round v. Jones*, 1 Douglass, Michigan R. 188; *Russell v. Babcock*, 2 Shepley, 128; *Johnson v. Wilmarth*, 12 Metcalf, 416.

If the consideration moves from the promisee, and is a detriment to him, it need not be adequate in value or advantageous to the promisor. *Silvis v. Ely*, 3 W. & S. 420, 428. Accordingly, a declaration averring that in consideration that the plaintiff would receive the promissory note of two persons, and thereby give time for the payment of a debt due by one of them, the defendant promised to pay the debt if the note was dishonored, discloses a sufficient cause of action. *Walton v. Mascall*.

It results from these principles that if A. is indebted to B. and B. to C., and it is agreed between the three that C. shall accept A. as his

debtor, instead of B., the relinquishment of the right of action against B., will support the contract. For as C. can no longer, under these circumstances, recover against B., his only remedy lies in a suit on the promise made by A. *Tallock v. Harris* 3 Term 175; *Wilson v. Coupland*, 5 B. & Ald. 228; *Grove v. Sims*, 5 Blackford, 498; *Heaton v. Angier*, 7 New Hampshire, 397; *Smoat v. Nye*, 3 Indiana, 517; *Hillard v. Porter*, 18 Id. 503; *Martin v. Mauer*, 10 Richardson, 371; *Cook v. Barnet*, 15 Wisconsin, 596; *Weed v. Weed*, 22 Conn. 364; *Hodson v. Anderson*, 3 B. & C. 842; *Lacy v. McNeile*, 4 D. & R. 7; *Beale v. Caddick*, 2 Hurlstone & Norman, 326.

The cases of *Ward v. Evans*, 2 Lord Raymond, 298, *Maber v. Massias*, 2 Wm. Blackstone, 1072; and *Israel v. Douglass*, 1 H. Bl. 239; may be cited as instances of this principle. In *Ward v. Evans*, the defendant was indebted to Fellows in the sum of £60, and it was agreed between Fellows, the plaintiff and the defendant, that this amount should be paid to the plaintiff on account of a debt due by Fellows to him. This agreement was carried into effect by crediting the defendant with £60, on a note from him to Fellows, and giving the note of a third person for £60 to the plaintiff. The maker of this note proved to be insolvent and the plaintiff sued for money had and received. Lord Holt said that when Fellows directed the money to be paid to the plaintiff, and the defendant had credit on his note, it amounted to the receipt of so much to the plaintiff's use, and when the note which the plaintiff took proved unavailable, he might recover on the common counts. In *Maber v. Massias*, a draft drawn on a particular fund in the hands of the defendant, and therefore not negotiable, was accepted by him, and an action for money had and received brought by the payee. It appeared in evidence that the defendant was indebted to the drawer, and the plaintiff had judgment apparently on the ground that the acceptance was an appropriation of the debt to the use of the plaintiff.

In *Israel v. Douglass*, one Delaval, was indebted to the plaintiff for money lent, and requested a further advance, which the plaintiffs refused to make without security, whereupon Delaval gave them an order on the defendants who were in debt to him. The defendants objected to the amount, but promised to pay the plaintiffs whatever should appear to be due on a settlement of their account with Delaval. The court held the promise binding and that it might be enforced through an action for money had and received. Gould, J., said if my debtor tenders me money and I give it back and tell him to pay it to another, he in effect receives it for the use of that other.

Whether these decisions went on the ground of equitable appropriation or of contract in the legal sense of the term, is not altogether clear. In *Maber v. Massias* the plaintiff had given nothing for the promise

which he sought to enforce. It would hardly, therefore, be followed in England at the present day. A promise by one man that a debt due by him to another shall be paid to a third, may be viewed as the transfer of an antecedent right, or as a new and distinct obligation for the payment of a sum certain, or which is capable of being reduced to certainty. In the latter aspect it may be valid, although nothing was due by the promisor. *Corbett v. Cochran*, 3 Hill, S. C. 41; *Beale v. Caddick*, 2 Hurlstone & Norman, 326. If a man obtains credit for himself or for a third person, by promising to pay a debt which he does not owe, he will be as much bound as if the debt was due. *Beale v. Caddick*. The essential requisite is that the plaintiff should have given or relinquished something valuable on the faith of the promise. A new and valuable consideration moving from him is indispensably requisite under the strict rule of the common law, and unless this appears, the contract must fail, or cannot be sustained without the aid of equity. In *Wharton v. Walker*, 4 B. & C. 163, a landlord drew an order on his tenant in favor of the plaintiff, to whom he was indebted. The order was transmitted to the tenant and deducted by him in settling for the accruing rent. The appropriation was therefore complete as between the drawer and drawee. But the court held that the plaintiff could not enforce it as a contract, because it did not appear that he had agreed to relinquish his claim against the landlord and look exclusively to the tenant. The minds of the parties did not meet in a simultaneous agreement, nor was the plaintiff's taking the draft and presenting it for payment a consideration moving from him. The point was decided the same way in *Cochran v. Green*, 9 C. B., N. S. 448. And when the question arose in *Warren v. Batchelder*, 15 N. H. 129, 16 Id. 580, Gilchrist, J., said, "that all the best-considered cases recognize the principle, that the party must sue who furnishes the consideration, which consideration was upon the facts of those cases, the extinguishment of the plaintiff's debt. In the case now before us the consideration did not move from the plaintiff. This debt was not extinguished, and he can maintain no action. We do not mean to say that there must have been an express agreement by the plaintiff to accept the defendant as his debtor, and extinguish his original debt, but such an agreement must be proved, either by direct evidence, or by proof of facts, which show that it must have been made."

When, however, the case was heard subsequently on a writ of error, the court held that it was not necessary that the plaintiff should be a party to the contract when originally made. If a debtor and creditor agreed that the fund should go in payment of a debt due to a third person, the latter might ratify the transaction by making a demand and bringing suit, and if he did his assent would be as available as if it had been given in the first instance. Such a demand was an election



to discharge the original debtor and look solely to the defendant. See *Sanderson v. Lambertson*, 6 Binney, 129. There was consequently a valuable consideration moving from the plaintiff to sustain the promise. A demand was, however, an essential prerequisite, without which the suit must fail. *Butterfield v. Hartshorne*, 7 N. H. 345. Whatever may be thought on this point, it is clear that if a creditor agrees to take a demand against a third person in satisfaction, and the latter assents subsequently he will be bound, because both the antecedent debts are under these circumstances merged in the new obligation as a necessary inference. *Lacy v. McNeile*, 4 D. & R. 7.

In *Esling v. Zantzinger*, 1 Harris, 50, the case was in all respects similar to *Wharton v. Walker*, except that the tenant accepted the order in writing when presented, and the court held that this constituted a privity of contract entitling the payee to sue, although the order had been given as collateral security and not as payment, and there was consequently no extinguishment of the antecedent debt.

In *Fairlie v. Denton*, 8 B. & C. 395, a promise by one man to pay a debt due to another, to a third person to whom the latter was indebted, was held to be invalid, because the amount due by the promisor was not ascertained at the date of the agreement, though reduced to certainty subsequently before action brought. And in *Wharton v. Walker*, Littleale, J., said that such a contract must be specially declared on, and would not support a count for money had and received. An unliquidated balance may, however, obviously be transferred with the consent of the debtor; *Beale v. Caddick*, 2 Hurlstone & Norman, 26; *Grove v. Sims*, 5 Blackford, 498; because that which can be made certain is sufficiently definite; and in *Lacy v. McNeile*, 4 D. & R. 7, assumpsit for money had and received was held to be the appropriate remedy in such cases, on the authority of *Israel v. Douglass*.

Agreeably to the later English decisions, an agreement to apply a debt due to A. in payment of a debt due by him to C. is invalid, unless A. is discharged, for if he still remains liable no consideration moves from C., or, in other words, nothing is lost or relinquished by him. *Cochran v. Green*, 9 C. B., N. S. 448; *Warren v. Batchelder*, 15 N. H. 131; *Wharton v. Walker*, 4 B. & C. 163; *Fairlie v. Denton*, 8 Id. 395; *Blunt v. Boyd*, 3 Barb. 209; *Blymire v. Boistle*, 6 Watts, 182.

A simpler rule, however, prevails in the American courts, under which the assignment of a debt followed by a promise to the assignee, will create a legal obligation which he may enforce by suit (ante, 203); *Compton v. Jones*, 4 Cowen, 131; *Crocker v. Whitney*, 10 Mass. 316; *Moar v. Wright*, 1 Vermont, 57; *Edson v. Fuller*, 2 Foster, 183; *Perry v. Harrington*, 2 Metcalf, 368; *Cromelien v. Mauger*, 5 Harris, 169; *De Barry v. Patterson*, 8 Wright, 546; *Landis v. Urie*, 10 S. & R. 317, 321; *Ernest v. Park*, 4 Rawle, 452, 456; *Allis v. Jewell*, 36 Vermont,

547; *Clark v. Thompson*, 2 Rhode Island, 146; *Mowry v. Tod*, 12 Mass. 281; *Jones v. Walton*, 13 Id. 304; *Wilson v. Hill*, 3 Metcalf, 66; *Goss v. Barker*, 22 Vermont, 520; *Tibbells v. Gerrish*, 5 Foster, 41; *Thompson v. Emery*, 7 Id. 269; *Perry v. Harrington*, 2 Metcalf, 368; *Gibson v. Cooke*, 20 Pick. 15; *Currier v. Hodgson*, 3 New Hamp. 82; *Bliss v. Rollins*, 6 Vermont, 529; *Bucklin v. Ward*, 7 Id. 195; *Hodges v. Eastman*, 12 Id. 358; *Stiles v. Farren*, 18 Id. 444; *Lang v. Fiske*, 2 Fairfield, 385; *Norris v. Hall*, 18 Maine, 332; *Smith v. Berry*, Ib. 122; *Cleaton v. Chambliss*, 6 Randolph, 16; *Ashton v. Contee*, 4 Harris & Johnson, 251; *Barger v. Collins*, 7 Id. 213; *Compton v. Jones*, 4 Cowen, 13; *The Mount Olivet Co. v. Shubert*, 2 Head. 116; *Ford v. Adams*, 2 Barb. 349; *Tiernan v. Jackson*, 5 Peters, 580. For, as the assignment of a chose in action divests the right of the assignor, and confers it absolutely on the assignee, if the debtor ratifies the transaction by an express promise, he will be bound at law (ante, 203). See *Westoby v. Day*, 2 Ellis & Bl. 605; *Welsh v. Manderille*, 1 Wheaton, 233; *Morton v. Naylor*, 1 Hill, 483. "If," said Lowry, J., in *Cromelien v. Mauger*, "there be a debt due by the defendant, which has been assigned to the plaintiff, and in consideration of that debt and that assignment, the defendant expressly promises to pay the plaintiff, the latter has a good cause of action." This is entirely consistent with the rule that a promise cannot vary an antecedent liability, because the promise only operates to perfect the remedy, by enabling the assignee to sue in his own name, instead of being obliged to proceed in that of the assignor.

The question arose in *Crocker v. Whitney*, 10 Mass. 316, where the court gave the following reasons for refusing to arrest the judgment on a declaration alleging an assignment of a debt, followed by a promise from the debtor to the assignee. "If, on examining the declaration, aided as it is by the verdict, we can find a legal cause of action substantially set forth, we are bound to render judgment upon it for the plaintiffs. We have, accordingly, considered the facts in this case as showing an assignment to the plaintiffs by Head, and the other original creditors respectively, of so much of this money in the defendant's hands; an assent thereto by the defendant, and a promise by him to the plaintiffs to pay the same to them accordingly. The general principle has been long well settled, that such an assignment, with notice to the defendant, imposes on him an equitable and moral obligation to pay the money to the assignee; and although such an obligation is not sufficient to support an implied assumpsit, so as to enable the assignee to maintain an action in his own name, yet it is a good consideration for an express promise to that effect. It is no objection to such an assignment, that it is of an unliquidated balance of account. If the defendant promises to pay what shall appear to be

due from him, he is liable for the amount when ascertained. Nor does it make any difference, if, instead of a debt now due, the assignment is of money which is expected to become due at a future day to the assignor. When the contingency happens and the money is due, the debtor is liable for the amount, on the promise to the assignee." A reassignment will, however, defeat such a contract, by removing the basis on which it rests, and the antecedent obligation will then revive, and may be enforced by suit. *Clark v. Parker*, 4 Cushing, 361.

The assignment need not be formal, or in express terms, it is enough that the intention to make the transfer be manifested unequivocally by appropriate words or acts. *Compton v. Jones*, 4 Cowen, 13; *Guernsey v. Gardner*, 49 Maine, 167; *Hutchins v. Watts*, 35 Vermont, 360; 3 Leading Cases in Equity, 357, 3 Am. ed. In *Crocker v. Whitney*, an averment that the defendant was indebted to Head, and Head to the plaintiff, and that the defendant, at the instance and request of Head, promised the plaintiff to pay him the amount due to Head, was accordingly held sufficient after verdict. Jackson, J., said, "another question is whether the declaration sets forth a sufficient assignment of the fund in the defendant's hands to support the promise. No precise form is requisite for this purpose. A written order from the creditor directing the payment of the debt to a third person is confessedly sufficient. In the cases cited for the plaintiff the order was in writing, but there is no reason why a verbal agreement should not be equally effectual. If, however, a written order is necessary, the court are bound to presume, after verdict, that it was so proved. The plaintiff averred that the promise of the defendant was made at the special request and instance of the creditor, and the jury could not have found this to be true unless it was established by legal evidence."

It is well settled, in accordance with this decision, that all that is requisite to constitute an equitable assignment of a chose in action, is a request or order from the creditor for the payment of the debt to a third person, based on a sufficient consideration as between the assignor and assignee; which may be found in the existence of a precedent debt which the transfer is designed to secure. *Guernsey v. Gardner*, 49 Maine, 167; *Cunningham v. Garvin*, 10 Barr, 366; *Pope v. Hartly*, 14 California, 403; *Alexander v. Adams*, 1 Strobhart, 47; *Walker v. Mauro*, 18 Missouri, 561; 2 Leading Cases in Equity, part 2, 358, 3 Am. ed.; *Hutchins v. Watts*, 35 Vermont, 36.

It is a consequence of this doctrine that the acceptance of a draft or order directing the payment of the whole or any portion of a debt to a third person, will create a valid obligation in favor of the payee on which a recovery may be had against the debtor. *Jackman v. Bowker*, 4 Metcalf, 235; *Bourne v. Cabot*, 3 Id. 305; *Pope v. Heath*, 14 Cali-

foria, 403; *Burch v. Hill*, 24 Texas, 156; *Esling v. Zantzinger*, 1 Harris, 50; *Ward v. Evans*, 2 Lord Raymond, 928; *Maber v. Massias*, 2 Wm. Bl. 1072. A declaration that the drawer was indebted to the payee, and the defendant to the drawer, and that he, in consideration thereof promised to pay the draft, was accordingly held sufficient in *Jackman v. Bowker* as showing an equitable assignment ratified by a promise.

Such an instrument differs from a bill of exchange in being limited to a particular fund, and effect will be given to the intention of the parties which is to transfer the debt to the payee. Their object is to bind the fund, and acceptance will not, in the absence of fraud and undue concealment, impose a personal obligation beyond the amount actually due. On the other hand, a bill drawn generally does not operate as an assignment before acceptance; *Welsh v. Mandeville*, 6 Wharton, 286; *Phillips v. Stagg*, 1 Edwards, 108; *Cowperthwait v. Sheffield*, 1 Sandf. 411, 3 Comstock, 243; *Harris v. Clark*, Ib. 93; *Watson v. The Duke of Wellington*, 1 Russell & Mylne, 602, 3 Leading Cases in Equity, 3 Am. ed. 358; and when the acceptance fails from any cause as such, it cannot be sustained as a contract without some new and valid consideration moving from the payee. *Pope v. Luff*, 5 Hill, 413, 7 Id. 578.

An order on a particular fund will not, however, support a promise unless it is so drawn as to pass the fund. A declaration that the defendant was indebted to one J. S., and that J. S. being indebted to the plaintiff, gave him an order on the defendant for sixty cords of wood, which the defendant promised to deliver for and on account of the debt due by him to J. S., was accordingly held insufficient in *Ford v. Adams*, 2 Barb. 349, as disclosing an intention to create a new, and not to transfer the existing obligation. So, an order drawn by a creditor of a society or corporation on the funds in the hands of their treasurer or agent, will not sustain a promise by the latter to the payee, because the fund belongs to the principal and is not subject to the control of the drawer or drawee. *Quin v. Hanford*, 1 Hill, 82.

To bring the case within the scope of these decisions, the equity of the plaintiff must, however, be sufficiently complete to uphold the promise. When the legal title does not pass, chancery will not ordinarily interfere to sustain a transfer which is not based upon some good or valuable consideration. An agreement between a debtor and a creditor, to pay the debt to a third person to whom the creditor was not indebted, would probably fail on this ground, even if the person to whom the payment was to be made was a party to the contract. For as the latter would, under these circumstances, be a mere volunteer, he would have no status in either jurisdiction (ante, 178). An existing debt is, however, a sufficient consideration for any transfer

that may be made, either as security or payment. The assignment of a demand as a collateral security will accordingly confer an equitable right, which may, under the decisions in the United States, be rendered legally binding by an express promise to the assignee.

In these instances the transfer was perfected by a promise which bound the debtor personally to the assignee. Whether a contract between a debtor and a creditor to pay the debt to a third person, in consideration of a release from the creditor, can be enforced by the person to whom the payment is to be made, is a question which has been elaborately discussed, but is not altogether clear. The better opinion would seem to be that it cannot, unless he is a party to the contract, or the transaction operates as an assignment of the debt, and is ratified by a promise from the debtor. *Blunt v. Boyd*, 3 Barb. 209; *Ramsdale v. Horton*, 3 Barr, 330; *Wharton v. Walker*, 4 B. & C. 163; *Coxon v. Chadley*, 3 Id. 591; *Mellen v. Whipple*, 1 Gray, 317; *Butterfield v. Hartshorne*, 7 N. H. 345. For when he is neither a contracting party nor the owner of the fund, the right of action will reside in the creditor, as the person from whom the consideration moves, and who will be injured by the breach. *Blymire v. Boistle*, 6 Watts, 182; *Morrison v. Birkey*, Ib. 349; *Hubbert v. Borden*, 6 Warton, 79, 94. It was indeed suggested, in the dissenting opinion of Harris, J., in *Blunt v. Boyd*, on the authority of *Israel v. Douglass*, 1 H. Bl. 239; that the transaction may be construed as a payment of the debt to the creditor, and a repayment by him to the use of the third person. But this interpretation is not admissible, unless the debtor is discharged from the original obligation; and the judgment of the court was in favor of the defendant. A promise to pay B. a debt due to A., and the receipt of money from A. for the use of B., are two such different things, that they cannot properly be placed in the same category. In the one case, there is no liability to A., the obligation of the bailee is exclusively to B., and the transaction might be effectual as a gift by force of the delivery without the aid of a consideration. In the other he is not a party to the consideration or the contract, nor does he acquire an equitable right or title to the fund.

The point was critically considered in *Blymire v. Boistle*, 6 Watts, 182 (ante, 181). Sergeant, J., said, that if one person contracted with another to pay money to a third, and the latter was the only party interested in the fulfilment of the engagement, he might enforce it by suit. But if the party to whom the promise was made had an interest that would suffer if the contract was not performed, he was obviously entitled to sue for his own protection. Such a case might arise where a debtor promised to pay the debt to a third person, to whom the creditor was indebted. If, under these circumstances, the person to whom the promise was made, and the person in whose favor it was to

be performed, could each maintain a suit, two recoveries might be had for the same cause. The proper remedy was, therefore, in equity, which could bring all the parties before it, and so mould the decree as to prevent circuitry of action. But as this could not be done by a court of law, the remedy would be confined to the party to whom the debt was originally due.

In the case before the court, the defendant below, Blymire, had promised Gladstone, to whom he was indebted, to apply the amount due to the discharge of a judgment against Gladstone, which had been assigned to the plaintiff below, Boistle, and the question was whether the latter could enforce the contract in the absence of proof that he had participated in it, or that a consideration had moved from him. It was clear that the right to issue execution on the judgment remained in Boistle, and that as Gladstone might be injured in this way if the defendant Blymire failed to fulfil his promise, he had a right of action on the promise against the defendant. If, therefore, the plaintiff could also maintain an action, the defendant might be sued twice and compelled to pay the debt to two different persons. The equity of the case was, and chancery would decree, that it should be paid but once, and that the money should go to the plaintiff on his releasing Gladstone. At law each party must sue separately, and it was necessary to determine whether the right of action lay with Boistle, to whom the money was to be paid, or with Gladstone, from whom the consideration moved. The proper course obviously was that Boistle should proceed against Gladstone and Gladstone against Blymire, unless one suit could be brought in the name of Gladstone against Blymire for the use of Boistle. The judgment which had been entered in the court below in favor of Boistle must, therefore, be reversed.

This argument would seem to lead to the following inferences: First, That a contract between a debtor and a creditor for the payment of the debt to a third person, confers a right upon the latter which equity will enforce. Next, That if the creditor is indebted to the person to whom the payment is to be made, this equity cannot be enforced at law, because the creditor will then have an interest in the fulfilment of the promise which he is entitled to protect, and the debtor ought not to be exposed to two actions for the same cause. Finally, That where the effect of the transaction is to merge or extinguish the antecedent obligation, this difficulty will be obviated, and a suit may be maintained by the person beneficially interested in the performance of the promise.

These propositions must be taken with some degree of qualification. Such a transaction may be viewed as an equitable appropriation or transfer of a chose in action, or as a contract at common law. In either aspect, a third person claiming under it, must show some consideration as the basis of his right. If he has relinquished nothing

and nothing is due to him, he is, as we have already seen, a mere volunteer. Hence, if it be true, as was alleged in *Blymire v. Boistle*, that when A. promises that a debt due to B. shall be applied in payment of a debt due from B. to C., the latter obligation is a reason why the contract should not be enforced at law, it is also an element without which equity will not enforce the contract.

If, therefore, the question is viewed solely as one of common law, we may easily agree that C. cannot recover without showing first that a debt was due to him from B.; and next that B. was discharged and C. accepted in his place.

If we now turn to the doctrines of equity, the difficulty will in a great measure disappear. To sustain an equitable assignment it is not necessary that the debt, on account of which the transfer is made, should be satisfied, it is enough that it exists. An assignment by way of collateral security is as valid as if it was accepted in payment. The legal relations of the parties are not, however, varied by the transfer. All that the assignee acquires is a right to sue in the name of the assignor. 3 *Leading Cases in Equity*, 379, 3 Am. ed. He cannot proceed in his own right without the express assent of the debtor. If, however, the latter thinks fit to enter into a direct engagement to the assignee, it will be legally binding and may be enforced by suit. It is not an answer, under these circumstances, that the defendant is liable to the assignor, and may be compelled to pay twice, because the assignment and promise would be a good plea in bar to such a suit.

Moreover, and this seems to have been overlooked in *Blymire v. Boistle*, payment to the assignee of a chose in action is payment to the assignor, either before or after the demand has passed into judgment, so that if there may be two recoveries there can be only one satisfaction.

The obstacle to a recovery in *Blymire v. Boistle* obviously, therefore, was, that the plaintiff below, Boistle, was not a party to the contract, and that no promise was at any time made to him. *Esling v. Zant-zinger*, 1 Harris, 50. Conceding, as the language of the court implies, that the transaction operated as an equitable assignment, it still conferred a mere equity which could not be enforced at law. A subsequent promise to Boistle would have obviated this objection by bringing the case within *Crocker v. Whitney* and *Compton v. Jones* (ante, 145, 210).

In this aspect of the question, a contract between A. B. and C., that the amount due by A. to B. shall be appropriated to the payment of a debt from B. to C., will be equally binding, whether the promise of A. is taken by C. in satisfaction or merely as collateral security. For as the equity of C. is clear in either case, there is a sufficient basis for the promise in both. The chief difference is that the recovery must be limited in the latter case to the amount actually due as between A. and B.

This results from the general rule that when a transfer is made as security and not in payment, the assignee will stand in the shoes of the assignor, and be subject to any defence that would be good against him. *Petrie v. Clark*, 11 S. & R. 377.

It may, accordingly, be regarded as well settled in the United States, that the assignment of a debt as collateral security, will sustain a promise from the debtor to the assignee. *Estling v. Zantzinger*, 1 Harris, 50. In *Crocker v. Whitney*, 10 Mass. 316, the declaration was held to disclose a sufficient consideration, although it contained nothing to show that the promise had been accepted in satisfaction, or that the original demand was merged in the new course of action. In *Keller v. Rhoads*, 3 Wright, 511, an agreement between a principal, a surety and the defendant, that the latter should collect certain moneys due to the principal, and hold them for the indemnity of the surety, was in like manner held to give a cause of action which the latter might enforce, on proof that the principal was in default. Strong, J., said that any contract by a principal tending to indemnify the surety, had a sufficient basis in the relation between the parties, and the equitable obligation which it imposed. If, therefore, a principal deposited money in the hands of a third person for the protection of the surety, there was good consideration for what he did, and the receipt of the money was a sufficient consideration for a promise by the bailee to apply it in the way prescribed.

The English courts however, adhere with great strictness to the rule, that a promise by the debtor for the payment of the debt to a third person, is not valid unless the latter is a party to the contract, and agrees to relinquish some claim or demand against the creditor (ante, 203). *Cochran v. Green*, 9 C. B., N. S. 448.

In *Cochran v. Green*, the defendant pleaded that before the commencement of the suit, the plaintiff was indebted to one Smith in the sum of £339, and that the defendant, at the request of the plaintiff, agreed with Smith to pay him the said sum, and Smith agreed to accept the defendant as his debtor therefor instead of the plaintiff, and that the defendant was still liable to pay the same to the said Smith, whereby the plaintiff's claim to recover so much of the moneys mentioned in the declaration was barred. It was conceded at the argument, under the authority of *Lilly v. Hays*, 5 A. & E. 548, that if a man receives a sum of money from another, for the use of a third person, who is informed of what has occurred, and ratifies the transaction, all the parties will be bound, and the person for whose benefit the payment is made, may maintain assumpsit for money had and received. And it was contended on behalf of the defendant, that the case is substantially the same, when a creditor agrees to forego his claim against the debtor, in consideration of a promise by the latter to pay the debt to



a third person to whom the creditor is indebted, and who subsequently accepts the promise in lieu of the original demand. Erle, C. J., said, that the utmost the plea amounted to was, that the liability of the defendant was accepted by Smith as a collateral security. It was a well known rule that if three persons stood in the relation in which the plaintiff, the defendant, and Smith were described as standing in the plea, and the three agreed that the plaintiff should be discharged of the debt due from him to Smith, and that the defendant's liability to the plaintiff should be transferred to Smith, the agreement might be pleaded by the defendant as a discharge of the debt due by him to the plaintiff. Short of this, there would not be any valid defence. There was nothing on the face of the plea to preclude Smith from suing the plaintiff. He did not discharge the plaintiff, by accepting the defendant's promise to pay the debt as collateral security.

On the other hand in *Warren v. Batchelder*, 16 New Hampshire, 580, the court, held in direct opposition to *Cochran v. Green*, and *Blymire v. Boistle* (ante, 181), that if a contract between a debtor and a creditor, for the payment of the debt to a third person, be assented to by the latter subsequently, he need not participate in it at the time, and that such assent will be sufficiently evinced by a demand on the debtor, followed by the institution of a suit to enforce the contract. It has been shown above that such an election is not necessary, unless it is made so by the terms of the contract, and that the transfer of a debt as collateral security will uphold a contemporaneous or subsequent promise to the assignee.

The dictum of Gould, J., in *Israel v. Douglass*, implies that a contract between a creditor and a debtor, to apply the demand to the payment of the debt due by the creditor to a third person, may be enforced by the latter, through an action for money had and received. *Carroway v. Cox*, 1 Busbee, 173. The weight of authority in England and the United States, is, however, against the right to maintain such an action, unless the transaction operates as an equitable assignment, or the person to whom the payment is to be made, relinquishes some existing right on the faith of the agreement. *Wharton v. Walker*; *Cochran v. Green*; *Farley v. Denton*, 8 B. & C. 395; *Ramsdale v. Horton*, 3 Barr, 330; *Blunt v. Boyd*, 3 Barb. 209. In *Blunt v. Boyd*, an account was settled between a debtor and creditor, by the debtor's giving a note for part of the debt, and promising to pay the residue to a third person to whom the creditor was indebted. The court held, that as the plaintiff was not a party to the contract, and no consideration moved from him, he could not maintain the suit; and the same point was decided in *Ramsdale v. Horton*.

It has, notwithstanding, been said, that if A. is indebted to B., or has money in his hands belonging to B., and in consideration thereof agrees

to pay the whole, or a portion of the fund to C. in discharge of a debt due to him by B., the agreement may be enforced by C. *Carnegie v. Morrison*, 2 Metcalf, 381; *Mellon v. Whipple*, 1 Gray, 317, 322; *Nelson v. Hardy*, 7 Ind. 304, 368; *Warren v. Batchelder*, 16 N. H. 580; *Martin v. Maner*, 10 Richardson, 271; *Brewer v. Dyer*, 7 Cushing; and the point was so adjudged in *Warren v. Batchelder*, and in *Brewer v. Dyer* (ante, 175, 200).

It is, as we have seen, established in some of the State tribunals, that a promise to pay the debt of another, in consideration of assets received from him, may be enforced by the creditor; *Curtis v. Norris*, 8 Pick. 280 (ante, 173); and this is universally conceded when money is had and received for such a purpose. Whether an agreement between a debtor and creditor, to appropriate the debt to the use of a third person, is equivalent to a tender to the creditor, and a return of the fund by him, is a point about which the authorities are diametrically at variance. See *Israel v. Douglass*; *Warren v. Batchelder*; *Wharton v. Walker*; *Cochran v. Green* (ante). One objection to this inference is, that such an agreement is *prima facie* an accord unexecuted, which does not vary or displace the existing rights on either side. If the original creditor can sue and recover, the money is his, and not that of the person to whom he has directed it to be paid. When, however, the creditor gives a receipt in full, in consideration of a partial payment and a promise to pay the residue to a third person to whom he is indebted, or when such an agreement is made in consideration of the surrender of the note or other security held for the debt, the antecedent obligation is at an end, and if the person to whom the payment is to be made elects to ratify the contract, he may well maintain assumpsit for money had and received to his use. *Warren v. Batchelder*, 16 New Hamp 580. This would seem preferable to the explanation given in *Warren v. Batchelder*, that the plaintiff had, by proceeding on the new promise, extinguished his antecedent right. It may be added, that when assets are received or held by one man, subject to an appropriation to the debt of another, the holder is, to the extent of the fund, a principal, and will be bound as such, to indemnify the debtor, if the obligation is from any cause thrown upon him. For a like reason, the creditor may file a bill in equity, to compel the execution of the trust. The assumption of the debts of a firm by a partner, in consideration of a transfer of the partnership assets, is one among many instances of a principle which applies whenever assets are taken subject to a debt. See notes to *The United States v. Howell* (post). *The Aetna Insurance Company v. Wires*, 2 Williams, 93; *Crofts v. Mott*, 8 Barb. 305, 4 Comstock, 603.

The consideration for such a promise need not be the extinguishment of an antecedent right. Any act done or engagement made on the

faith of the promise, will be equally effectual. If a chose in action is purchased, in reliance on a promise by the assignor, the debtor, or a third person, that it shall be paid when due, the guarantor will be bound whether he does or does not participate in the consideration. *Hodges v. Eastman*, 12 Vermont, 358; *Bellows v. Morse*, 7 New Hampshire, 549. A promise to pay a debt, if the plaintiff would buy it from the creditor was accordingly held binding in *Bellows v. Morse* and *Warren v. Wheeler*, 8 Shepley, 484. Such transactions are manifestly valid, as between the immediate parties; and in *Fenner v. Mearns*, 2 Wm. Bl. 1269, a written promise by the obligor, to pay the bond to any one to whom it might subsequently be assigned, was held binding in favor of a third person who gave value for the instrument, in reliance on the assurance given by the obligor. The same principle was applied in *Watson v. McLaren*, 19 Wend. 550. See note to *Law-rason v. Mason* (post).

A promise to pay a debt to a third person to whom it is transferred in payment, is *prima facie* limited to the true balance when ascertained or adjusted, but if the debtor promises absolutely to pay a sum certain, or the amount apparent on the face of the transaction, without regard to what is really due, he cannot open the account or go behind the promise, after value has been given on the faith of it by the promisee. *Beale v. Caddick*, 2 Hurlstone & Norman, 326, 336. So far is this carried, that a false affirmation by which the assignee is deceived, will be conclusive, without a promise. 2 Smith's Leading Cases, 750, 6 Am. ed.

A promise to pay the precedent debt of another is *prima facie* invalid; *Wheelan v. Edwards*, 29 Georgia, 315; *Phipher v. Kingsland*, 25 Missouri, 66; *Cabot v. Haskins*, 3 Pick. 83; *Williams v. Hathaway*, 19 Id. 387; *Wentworth v. Wentworth*, 5 New Hampshire, 510; *Lyon v. Alvord*, 18 Connecticut, 66; *Parker v. Parker* 4 Munford, 293; *Salmon v. Brown*, 6 Blackford, 347; *Gilman v. Kibler*, 5 Humphreys, 19; *Russell v. Buck*, 11 Vermont, 166; *Bixler v. Ream*, 3 Penn. R. 282; *The Reading Railroad v. Johnston*, 7 W. & S. 317; even when it is given by a husband for a debt contracted by his deceased wife before marriage, or by an administrator, to pay a debt of the intestate in consideration of assets; *Mitcheson v. Hewson*, 7 Term, 348; *Rann v. Hughes*, Ib. 350, note; and the principle applies, although the contract be reduced to writing, and duly signed within the provisions of the Statute of Frauds. *Bixler v. Ream*, 2 Penna. 282; *Parker v. Carter*, 2 Mumford, 273; *Aldridge v. Turner*, 1 Gill, 427; *Mallory v. Gillett*, 21 New York, 412; *Sumwalt v. Ridgley*, 20 Maryland, 107, 116. The burden is on the plaintiff to show a consideration, and it will not be inferred from the most formal promise, nor from the acceptance of an order drawn on a particular fund, or for the delivery of goods. *Davis v.*

*McGrath*, 10 Barr, 170; *Quin v. Hanford*, 1 Hill, 82; *Pope v. Luff*, 5 Id. 513; 7 Id. 517; *Ware v. Adams*, 24 Maine, 177. In declaring on such a promise, the consideration must be set forth with reasonable certainty; *Ware v. Adams*, 24 Maine, 177; and if it is not, the defendant may move in arrest of judgment.

When a precedent debt is the sole consideration, it will not support a bill of exchange or promissory note. *Sowles v. Sowles*, 10 Vermont, 181, *Perrin v. Broadwell*, 3 Dana, 396; *Ten Eyre v. Vanderpoel*, 8 Johns. 120; *Crofts v. Beale*, 11 C. B. 172; *Mecorney v. Stanley*, 8 Cushing, 85; *Nash v. Russell*, 5 Barb. 556; *Wyman v. Gray*, 7 Harris, 409; *Sumwalt v. Ridgely*, 20 Maryland, 107, 116; *Bingham v. Kimball*, 17 Indiana, 396; *Tousey v. Turr*, 19 Id. 212. Under these circumstances, however, the presumption in favor of a consideration attending on such instruments, will stand until it is disproved, and it will not be enough to show that the instrument was given or accepted for the precedent debt of a third person, because it will still be taken for granted that the debt was suspended or extinguished, or that a consideration arose in some other form. *Popplewell v. Wilson*, 1 Strange, 164; *Mansfield v. Corbin*, 2 Cushing, 151; *Jennison v. Stafford*, 1 Id. 168; *Childs v. Morris*, 2 Brod. & Bing. 460; *Ridout v. Bristow*, 1 Cr. & J. 231; *Sowerby v. Butcher*, 2 Cr. & M. 360; *Rood v. James*, 1 Doug. Mich. 188; *Whiton v. Wilmarth*, 13 Metcalf, 422; *Wilkins v. Stevens*, 15 M. & W. 108. A note executed by the defendant as surety, with the view of inducing the creditor to indulge the principal, and followed by actual forbearance, was accordingly held valid in *Wheeler v. Slocumb*, 16 Pick. 52; and in *Popplewell v. Wilson*, the court said, that a note given for the debt of a third person, is within the statute of Anne, and in every way as negotiable as if value had been given and received. When the instrument is payable at a future day, there is a legal implication that the creditor agreed to wait until then; *Walton v. Muscall*, 13 M. & W. 152; *Baker v. Walker*, 14 Id. 465; and when it is not, there may still be a presumption that the defendant is in funds for the payment of the debt. See *Baker v. Walker*; *Walton v. Muscall*; *The Commercial Bank of Lake Erie v. Horton*, 1 Hill, 505; *The Mechanics' Bank v. Livingston*, 33 Barb. 458.

In *The Bank of Lake Erie v. Horton*, the suit was brought on two bills of exchange, drawn on the defendants and accepted by them. The acceptance was for the accommodation of the drawers, and subsequent to the period at which the plaintiff purchased the bills. And it was contended, that inasmuch as the plaintiffs had not given value for them on the faith of the acceptance, the contract failed for want of a consideration. This defence was obviously untenable, because the acceptance of a bill which is still running to maturity, precludes the right to proceed against the drawer, which would accrue upon the dishonor of the

instrument. "The bills," said the court were not yet accepted, when the plaintiffs took and discounted them. This raises the objection that the latter discounted the bills on the credit of the drawers and endorsers alone, and relieves the defendants to a certain extent from the doctrine of estoppel. They did not induce the plaintiffs to loan money, by previously putting their names on paper; and the question is, whether there be any other principle on which they are liable. I think there clearly is. The acceptance of a bill of exchange, to secure the debt of a third person, is more than a mere guaranty. The latter must show a consideration on its face. The acceptance of a bill imports a consideration; and though there was none in this case, as between the drawers and the defendants, yet it was not enough to stop with showing that. The defendants should, at least, have shown besides, that the bills were suffered to lie and mature, before they were presented for acceptance. They were drawn at sixty days after date, and discounted on the day of their date, and by acceptance presently, a delay to collect of the drawers would necessarily ensue. Till the contrary is shown, it must be intended that the acceptance was with a view to such forbearance, and in fact worked that consequence. This leaves the case open to the presumption, that the acceptances were in consideration of the forbearance. It is not enough to defeat a note or bill, that it appear on its face to have been made or accepted as a security for a precedent debt of a third person. (*Popplewell v. Wilson*, 1 Str. 264.) It will still be intended, that something collateral to the debt, and something adequate, formed the consideration; and the maker or acceptor must negative every possible intendment. This was held in *Ridout v. Bristow* (1 Tyrw. 84, 1 Compt. & Jerv. 231, S. C.; stated also in Chitt. on Bills, 80, a, Am. ed. of 1839, note g). The subject is fully considered there in the point of view now mentioned. It is not to be disguised, that a naked precedent debt of another, is not per se, such consideration as will not sustain a promise or acceptance. The books on guaranties all show that it is not, as well as the treatises on promissory notes and bills. Yet nothing is more common, than to rely on the note of A., taken as security for the debt of B. It is like a special guaranty, stating value received, which words, I take it, cannot be contradicted so as to destroy the guaranty. (See *McCrea v. Purmont*, 16 Wendell, 471, 472.) Accepting a bill, or making a note, is the same thing in legal effect; and it was held in the case just cited from the Exchequer Reports, that the words "value received," could not be met and overcome by parol; (vid. also, *Woodbridge v. Spooner*, 3 Barn & Ald. 233; 1 Chit. Rep. 661, S. C.) You can no more contradict the legal effect of the words in a note, than in its direct expression. (*Thompson v. Ketcham*, 8 John. 189.) Besides, the case is, I think, open to another intendment. When a man borrows money, and draws on his friend, who accepts, it

should be intended, that the acceptor authorized him, originally, to borrow on the terms that he would accept, which is equivalent to a request of the loan on the part of the acceptor."

In like manner, a sale or advance on the faith of an assurance that a third person will be answerable for the debt, may sustain a subsequent guaranty by him, because the effect is to defeat the right of action which would arise if the guaranty were withheld. *Deshon v. Dyer*, 4 Allen, 128; *Pillans v. Van Mierop*, 3 Burrows, 1663; *Paul v. Stockhouse*, 2 Wright, 302. This seems to be the true explanation of *Pillans v. Van Mierop*, which has not unfrequently been misunderstood. See notes, to *Laurason v. Mason* (post).

When, however, it distinctly appears from the tenor of the instrument or in evidence, that the holder did not relinquish or forbear any existing right, and that the only consideration is the antecedent debt of a third person, the contract is invalid (ante, 204). A note given by a widow for the debt of her husband, may be good as implying a promise to forbear proceeding against the administrator; *Ridout v. Bristol*, 1 Cr. & J. 231; but if this presumption is negatived by an averment that no letters testamentary or of administration have been taken out, the suit will fail. *Serle v. Wentworth*, 4 M. & W. 9, 795; *Jones v. Ashburnham*, 4 East. 455. And when issue was joined on a plea that the note was made by the defendant at the request of the plaintiff, as collateral security for a debt of £1,000, due by one John Beck to the plaintiff, and that the defendant was not at the time of making the note, or ever, liable to pay the said debt, or to give the note as collateral security for the same, and that there never was any value or consideration for the note, save as aforesaid, the court refused to set aside a verdict for the defendant, because the note was payable on demand, and negatived rather than implied an agreement for time. *Crofts v. Beale*, 11 C. B. 172. A recital that the instrument was given for value received is not an estoppel, and the defendant may still show that it was for an antecedent debt, and without consideration. *Wyman v. Gray*, 7 Harris & J. 409; *Sumwalt v. Ridgely*, 20 Maryland, 107.

The decisions which have been cited, establish that a precedent debt is not a consideration for a bill or note. It is a logical inference that the transfer of such an instrument as collateral security will not defeat an equity arising from a want or failure of consideration as between the original parties. Such at least should be the result agreeably to the general rule, that an assignee who gives nothing and sustains no detriment, is not a purchaser for value, and will stand in the same position as the assignor. There is, however, a wide divergence in the application of the principle to the negotiation of bills, and the authorities cannot be reduced to any common standard.

It is generally conceded that the suspension or extinguishment of an

existing obligation is a valuable consideration, whether the question arises on the execution or negotiation of a note or bill; *Goodman v. Simonds*, 20 Howard, 343, 370 (ante, 206), and there has been an increasing tendency to regard the transfer of such an instrument as security for an antecedent debt, as a negotiation for value, entitling the holder to recover notwithstanding the want or failure of consideration as between the original parties.

The point has not yet arisen in England in a shape for accurate or final determination. In *Poirier v. Morris*, 2 E. & Bl. 89, Coates & Co., of London, were indebted to Hovey, Williams & Co., who purchased a bill of exchange from the defendants, on Alexander Dassier, of Paris, and remitted it to the plaintiffs on account of a debt due to them by Hovey, Williams & Co., who were a firm residing and engaged in trade in the United States. The plaintiffs acknowledged the receipt of the bill, and credited Hovey, Williams & Co. with the amount. The bill was purchased on credit, and before time of payment arrived, Coates & Co. failed, and the defendants thereupon directed the drawee not to pay the bill. It was contended on their behalf that the plaintiffs were not holders for value. An antecedent debt was a consideration for a bill of exchange only when there was an agreement to suspend the right of action till the instrument matured. The court were, however, of opinion with the plaintiffs. Lord Campbell said that the case was the ordinary one of the receipt of a bill as security for an antecedent debt. On the other hand, Crompton, J., observed that the evidence was extremely strong that the right of the plaintiffs to sue Hovey, Williams & Co. was suspended. The letter written by them showed that they had placed the bill to the credit of Hovey, Williams & Co., and this was the purpose for which it had been sent. Under these circumstances, a jury would have no difficulty in finding that the bill was taken for account of the debt. It made no difference that Hovey, Williams & Co. had subsequently reimbursed the plaintiffs. This gave them an equitable right to the bill, but did not divest the legal title on which the suit was based. This decision obviously leaves the question as much at large as it was before.

If we now turn to the United States, we shall find the courts of the different States irreconcilably at variance. To give rise to a consideration there must be a detriment on one side or an advantage on the other. A creditor who takes a note or bill as collateral security, parts with nothing, nor does any definite or legally appreciable benefit accrue to the debtor. The transaction therefore is not a purchase for value. The doctrine was derived by the common law from equity, where it has been long and well established that a purchase will not defeat antecedent equities unless it is for value and without notice. 2 Leading Cases in Equity, 104, 3d Am. ed. In *Bay v. Coddington*, 5 Johnson's Ch. 54,

the complainant filed a bill, praying that certain notes which had been endorsed to the defendants in fraud of the complainant, might be surrendered. The answer denied all knowledge of the fraud, and alleged that the notes were taken as a guaranty and indemnity for the liabilities which they had incurred for the endorsers, and were afterwards compelled to pay.

The chancellor said that the defendants were not purchasers for a valuable consideration within the meaning or policy of the law. It was the credit given to the paper and the consideration *bona fide* paid on receiving it, which entitled the holder on the grounds of commercial policy to protection, even in cases of the most palpable fraud. It was an exception to the general rule of law that the title of the buyer could not rise higher than that of the vendor, and ought not to be carried beyond the necessity in which it arose. This decision was affirmed by the Court of Appeals and is still closely adhered to in New York. *Lawrence v. Clark*, 36 New York, 128.

The principle was accurately stated by C. J. Gibson, in *Petrie v. Clark*, 11 S. & R. 371, in the following terms: "The note on which suit is brought was endorsed to the executors in blank, for goods purchased from them, which were part of the assets, and the note itself was, consequently, assets in their hands. The executor who had this note in possession was indebted to the plaintiff, on his own promissory note, to nearly the same amount; and after his note had become due made an arrangement with the plaintiff, by which it was taken up and a new note at five months substituted in its stead; and the note on which suit is brought was handed over with the blank endorsement of the payee, as collateral security for the payment of this debt, the other executor being no party to the transaction, and the plaintiff being entirely ignorant of the circumstances under which the note in question came to the hands of the executor. On this naked statement of facts, it will be seen that collusion is altogether out of the case, and that the question is, whether the plaintiff is to be considered as a holder for value. If the note had been delivered to him in discharge of the debt, there would be no difficulty in saying, in the absence of collusion, that taking it in the usual course of business as an equivalent for a debt which is given up, would be a purchase of it for valuable consideration. But, as it appears on the bill of exceptions, that it was given in pledge for securing an antecedent debt which was not discharged, but suffered to remain, and as it does not appear that money was advanced, or any act done that would in law be a present consideration, the case presented was against the plaintiff. The evidence, therefore, *prima facie* made out a defence, although it might, I apprehend, have still been shown on the other side, that the plaintiff had a right to recover, provided he had been able to prove that time was given in consideration of obtain-



ing the note in question as security for the debt, and that in consequence the debt was lost. The giving of time would be a present and a valuable consideration, and a pledge on these terms would be the same as a pledge for money paid down. There is nothing in the commercial nature of the security to vary the nature of the transaction. Where the holder of a note or bill does not give value for it, he is in privity with the first holder; *Collins v. Martin*, 1 Bos. & P. 651. There is a difference, too, between a note regularly negotiated, which always supposes a consideration, and a note placed, like the present, in the hands of a creditor merely as a security, which, in this respect, stands exactly as it would if it were a bond; that is, as a mere pledge, subject in the hands of the holder to every equity that could be set up against it in the hands of the person from whom he obtained it. *Roberts et al., Executors of Horsman, v. Eden*, 1 Bos. & P. 398. In this respect, equity and the commercial law perfectly agree, both being founded on principles of reason as well as convenience. The question then is, whether the plaintiff is a holder for value; and as the case stands on the bill of exceptions, the evidence went directly to prove that he was not."

This case was followed in *Kirkpatrick v. Muirhead*, 4 Harris, 117, where Bell, J., said that it was established in Pennsylvania that the transfer of mercantile paper as collateral security for a pre-existing debt, did not constitute the transferee a holder for valuable consideration. The case was different where there was a new and distinct consideration moving between the parties to the transfer, such as giving up some other available security, releasing another party, drawer, or endorser, or conceding further time for payment. But the mere circumstance that the transfer induced delay would not be a consideration unless it was so agreed. Consideration, like every other part of the contract, must be the result of agreement; it must appear that the parties were influenced to the particular action by something of value, of convenience, or of inconvenience, recognized by all of them as the moving cause. That which was a mere fortuitous result flowing accidentally from an arrangement could not be a legal consideration.

It is established in many of the State tribunals, in accordance with these decisions, that to place the holder of a bill or note beyond the reach of prior equities, something must have been done or relinquished on his part that would have been a valid consideration for the execution of the instrument. For although a promissory note differs from an ordinary contract in being negotiable, still when the obligation fails as between the original parties, a third person should not be allowed to recover unless he has changed his position for the worse on the faith of the note, and would be a loser if it were not enforced. Taking an additional or collateral security for a pre-existing debt, conse-

quently, does not render the creditor a holder for value in the sense of the commercial or common law. *McBride v. The Farmers' Bank*, 26 New York, 260; *Scott v. Bills, Hill & Denio*, 363; *Bramhall v. Beckett*, 31 Maine, 205; *Mutter v. Storer*, 38 Id. 163; *The Trustees v. Hill*, 12 Iowa, 462; *Farmington v. The Bank*, 31 Barb. 183; *The Traders' Bank v. Bradner*, 43 Id. 379, 393; *The American Exchange Bank v. Corliss*, 46 Id. 19; *Fletcher v. Chase*, 10 New Hampshire, 38; *Smith v. Hall*, 5 Bosworth, 319; *The New York Co. v. De Wolf*, 3 Id. 86; *Cook v. Holmes*, 5 Wisconsin, 107; *Smith v. Babcock*, 2 Moody & Minot, 246; *Riv. v. Adams*, 9 Vermont, 213; *Petrie v. Clark*, 11 S. & R. 377; *Kirkpatrick v. Muirhead*, 4 Har. 117; *Bramhall v. Beckett*, 31 Maine, 205; *Bertrand v. Barlman*, 3 Ark. 150; *Williams v. Little*, 11 New Hamp. 66; *Prentice v. Zane*, 2 Grat. 362; *The Bank of Alabama v. Hale*, 6 Alabama, 63; *Andrews v. McCay*, 8 Id. 120; *Bay v. Coddingtton*, 3 Johnson's Chancery, 54; 20 Johns. 637; *Sargent v. Sargent*, 11 Vermont, 371; *Merriam v. The Granite Bank*, 8 Gray, 254; *Lee v. Smead*, 1 Metcalf, Ky. 628; *Alexander v. The Bank*, 2 Id. 536; *Prentiss v. Graves*, 33 Barb. 621; *Thompson v. Poston*, 1 Duvall, Ky. 389; *Ruddick v. Lloyd*, 15 Iowa, 441; *Fletcher v. Chase*, 16 New Hampshire, 38; *Rice v. Raitt*, 17 Id. 316; *Ryan v. Chew*, 13 Id. 589; *Cook v. Vandercook*, 5 Wisconsin, 106; *Jenkins v. Schaub*, 14 Id. 1, &c.

The consideration need not, however, consist in the payment of money or money's worth; if the taker cedes any existing right or agrees to forbear enforcing his remedies and give time, there is a valuable consideration in the legal sense of the term. The transfer of a note or bill in satisfaction of a debt, is consequently a negotiation for value, because the creditor gives up his original demand, and would be without remedy if he could not enforce the obligation which has been given in exchange. *Goodman v. Simonds*, 20 Howard, 313, 371; *Bostwick v. Dodge*, 1 Douglass, 413; *Dutheite v. Porter*, 13 Michigan, 533; *Brush v. Scribner*, 17 Conn. 338; *Homes v. Smyth*, 10 Maine, 177; *Hascall v. Whitmore*, 19 Id. 102; *Dudley v. Littlefield*, 21 Id. 418; *Norton v. Waite*, 20 Id. 175; *Bertrand v. Beckman*, 8 Ark. 150; *Farnum v. Belamy*, 4 McLean, 87; *Walker v. Geisse*, 4 Whar. 252; *Russell v. Haddock*, 3 Gilman, 233; *Ruddick v. Jones*, 6 Ired. 307; *Breckenridge v. Moore*, 3 B. Mon. 629; *Pond v. Lockwood*, 8 Ala. 669; *Barney v. Earle*, 13 Id. 106; *Bush v. Packard*, 3 Harrington, 383; *Bond v. The Central Bank*, 2 Geo. 92; *Emanuel v. White*, 38 Mississippi, 56; *Carlisle v. Wishart*, 11 Ohio, 172; *Roxborough v. Messick*, 6 Ohio, N. S. 448, 452; *Stauthers v. Kendall*, 5 Wright, 214; *The Bank v. Covington*, 5 Rhode Island, 515, 520; *Dixon v. Dixon*, 31 Vermont, 450; *Purchase v. Matison*, 3 Bosworth, 310; *Ives v. The Farmers' Bank*, 2 Allen, 236; *Stevens v. Campbell*, 13 Wisconsin, 575; *Blanchard v. Stevens*, 3 Cushing, 162; *McCuskey v. Sherman*, 26 Conn. 605; *Gray v. Lee*, 12 New York, 551;

*White v. The Springfield Bank*, 3 Sandford, 222; *The New York Works v. Smith*, 4 Duer, 362; *Purchase v. Mattison*, 3 Bosworth, 310; *Brown v. Leavitt*, 31 New York, 113; *Stevenson v. Highland*, 11 Minnesota, 198; *Conkling v. Vail*, 18 Illinois, 166; *Try v. Blackstone*, Ib. 538.

The principle is the same when a note or bill payable at a future day is taken as conditional payment, or when there is an express or implied agreement for forbearance in any other form. The delay arising from such a cause may be immaterial, or may result in the loss of the debt. And as the law has no measure by which this can be ascertained, it regards the suspension of an existing right albeit for a single day, as a sufficient cause for the discharge of a surety, or a new promise. *Depau v. Waddington* (ante, 161); *Roxborough v. Messick*, 6 Ohio, N. S. 448, 454; *Walker v. Geisse*, 4 Wharton, 258; *Myers v. Wells*, 5 Hill, 463; *Roxborough v. Messick*, 6 Ohio, N. S. 448, 454; *Fellows v. Prentiss*, 12 Smedes & Marshall, 462; *The Trustees v. Hill*, 12 Iowa, 462; *Ruddick v. Lloyd*, 15 Id. 441; *The Washington Bank v. Brewer*, Ib. 53; *Goodman v. Simonds*, 20 Howard, 343, 370; *The Traders' Bank v. Bradner*, 43 Barb. 379. Giving time was said by Ch. J. Gibson, in *Petrie v. Clark*, 11 S. & R. 377, 388, to be a present and valuable consideration, and a pledge on such terms the same as a pledge for money down; and this remark was cited and confirmed by Rogers J., in *Depau v. Waddington*, with the additional observation that in cases of this description, the existence of a consideration is everything, its amount or adequacy nothing, unless it is a merely colorable consideration (ante, 162).

In *Mercer v. Lancaster*, 5 Barr, 160, the suspension of the equitable right of a surety to compel the fulfilment of the contract by the principal, implied in taking the note of a third person as security, was held to be a valuable consideration entitling the surety to enforce the instrument against the defendant, by whom it had been executed without consideration for the accommodation of the principal. The agreement to suspend the antecedent debt need not be express, and may be implied from taking a bill or note payable at a future day; *Notes to Olive v. Spencer* (post); or giving credit for the amount of the instrument when it is transferred, *Poirier v. Morris*, 2 E. & Bl. 89. There must, however, be an agreement as distinguished from mere delay, and it has been said that a creditor will not become a holder for value by forbearing to sue in reliance on the goodness of the securities given for the debt, unless he promised to forbear, or in some other way put it out of his power to proceed without a breach of contract. *Fenouille v. Hamilton*, 35 Ala. 319; *McBride v. The Farmers' Bank*, 26 N. Y. 450; *Kirkpatrick v. Muirhead*, 4 Harris 117, 126; *Sidwell v. Evans* 1 Penna. Rep. 385; *Bestler v. Ream*, 3 Id. 282; *Clarke v. Russell*, 3 Watts, 213; *Ree v. Adams*, 9 Vermont, 233; *Gilman v. Kibler*, 5 Humph. 19; *McClure v.*

*McClure*, 1 Barr, 374. This results from the well established principle that an act will not be a consideration unless it is not only done on the faith of the promise, but in fulfilment of an express or implied condition imposed by the promisor. *Thorn v. Deas*, 4 Johnson. The case, said Balcom, J., in *McBride v. The Farmers' Bank*, "is not altered materially by a long course of dealing between parties by which the holder of the note has been in the habit of receiving payment of balances due him in notes, or because he has omitted to collect a balance due him by reason of an expectation or promise of payment of it in notes, or in consequence of his omission to collect it after taking such a note in payment of it. He has not in either case parted with or paid any present valuable consideration for the note, and if he fails to collect it or hold it, he is in no worse situation, legally, than he was before receiving it. He has only been disappointed by not obtaining payment of an antecedent debt, and that consideration is insufficient to prevent the true owner of the note from claiming the same or its avails, or the maker or endorser from setting up a defence to it existing in his favor, as against the payee or the former holder." It was conceded that the case of the *Bank of the Metropolis v. The New England Bank*, 1 Howard, 264; 6 Id. 212, where the transfer of a note as security for a general balance of accounts had been held to render the creditor a holder for value was directly in point, but the court adhered to the decisions in New York, as presenting the true rule of the commercial law.

It is, however, necessary to remember, in applying these principles, that forbearance in pursuance of a request for indulgence is a valuable consideration, although the creditor did not bind himself to give time, and may consequently sustain the negotiation of a bill or note (post).

To render the title of a purchaser valid against antecedent equities, the contract must, moreover, not only be made but executed while he is still ignorant of their existence, because it will otherwise be his duty not to proceed further with a transaction which cannot be consummated without injustice. 2 *Leading Cases in Equity*, 116, 3 Am. ed.; *Crandall v. Vickery*, 45 Barb. 156; *Hubbard v. Chapin*, 2 Allen, 328. In other words, the validity of such a transfer depends upon what took place before the assignee had notice of the fraud, and if he cannot succeed on this basis, what occurs subsequently, will not turn the scale. Payment in the note of the buyer is consequently not sufficient to defeat a prior equity, unless the instrument is negotiated and renders the maker liable to a third person. The rule is irrespective of the nature of the right transferred, and was applied in *Crandall v. Vickery*, to the endorsement of a promissory note, in consideration of a check, which still remained in the hands of the payee.

It is equally well settled that antecedent equities will not be divested unless the transaction is so far consummated before notice, as to vest

both the legal and equitable right in the assignee. *Atkinson v. Brooks*, 26 Vermont, 569. This results from the general principle, that as between equal rights the first must prevail, unless the other is sustained by the legal title. To render an endorsement valid, it must consequently be inscribed on the instrument itself, or on a paper appended thereto, and known as an *allonge*; *Southard v. Porter*, 43 New Hampshire, 379; and the transfer of a note or bill by a separate writing or oral agreement, will not enable the assignee to sue in his own name, or confer any better right than that held by the assignor. *Russell v. Scudder*, 42 Barb. 31; *Franklin v. Twogood*, 18 Iowa, 515; *Gibson v. Minet*, 1 H. Bl. 569, 605; *Douglass v. Wilkinson*, 6 Wend. 634, 639; *Folger v. Chase*, 18 Pick. 63; *Scott v. McDonough*, 14 Louisiana, 309; *Hopkirk v. Page*, 2 Brockenborough, 20; *Taylor v. Binney*, 7 Massachusetts, 479. If apt words are used the form is immaterial, and writing the name of the payee on the face of the instrument with an intent to pass the title may be as effectual as if it were duly endorsed. *Yarborough v. The Bank of England*, 16 East. 12; *Herring v. Woodhull*, 29 Illinois, 92.

But while these views prevail in many of the State tribunals, there is a large and increasing array of authorities in favor of the position, that a precedent debt is a valuable consideration for the transfer of a note or bill, although the creditor retains all his existing rights, and takes the instrument as an additional means of security or payment. *The Bank v. Covington*, 5 Rhode Island, 515; *Cobb v. Doyle*, 7 Id. 550; *Molson v. Hawley*, 1 Blatchf. 407; *Pugh v. Durfee*, Ib. 412. *Allaire v. Hartshorne*, 1 Zabriskie, 665; *Gibson v. Conner*, 3 Georgia 47; *Meadow v. Bird*, 22 Id. 246; *Valette v. Mason*, 1 Carter, 288; *McCarty v. Roots*, 21 Howard, 432; *Gardner v. Gager*, 1 Allen, 502; *Le Breton v. Pierce*, 2 Id. 814; *The Bridgeport City Bank v. Welch*, 29 Conn. 475; *The Bank v. Chambers*, 11 Richardson, 657; *Payne v. Bensley*, 8 California, 260; *Sailor v. Daniels*, 37 Illinois, 331; *Van Buskirk v. Day*, 32, Id. 260. This exception to the general rule seems to have originated in the language held in *Swift v. Tyson*, 16 Peters, 1 (ante, vol. 1st). The point actually there determined is entirely consistent with the anterior course of decision, because the bill in suit was taken in payment of a promissory note due by the drawers, and there was, consequently, a surrender of an existing right on the part of the plaintiff, constituting a consideration under any just view of the law. In delivering judgment, however, Mr. Justice Story declared it to be the opinion of the court, that receiving a negotiable instrument as payment or security for an antecedent debt is not only in the usual course of business, but a valuable consideration, because the creditor may thereby be induced to prolong the credit, or refrain from taking steps to enforce his rights. The cases of *Pillans v. Van Mierop*, 3 Burrows, 1664; *Bosanquet v.*

*Dudman*, 1 Starkie 1; *Ex parte Bloorham*, 8 Vesey, 531; *Hegwood v. Watson*, 4 Bingham, 496; *Bramah v. Roberts*, 1 Bing. N. C. 469; and *Percival v. Frampton*, 2 Cr. M. & R. 180, were said to establish that "a bona fide holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration entitled to protection against all the equities between the antecedent parties," and *Coolidge v. Payson*, 2 Wheaton, 66; *Townsley v. Sumrall*, 2 Peters, 170; and *Brush v. Scribner*, 11 Conn. 388, were also cited and relied on as directly in point. Catron, J., dissented from these dicta, because the question was not presented by the bill of exceptions, or essential to the decision of the cause, and should not be determined by anticipation before it actually arose. It does not appear that the cases cited by Mr. J. Story, warrant the inference that a consideration which is confessedly insufficient for the inception of a contract, will sustain the negotiation of one already in existence, and may on the contrary, be referred to on one of two grounds, that a credit given is a valuable consideration for a pledge of credit in return, or that such a consideration may arise from the suspension or extinguishment of an existing right (ante, vol. 1, notes to *Swift v. Tyson*).

In *Coolidge v. Payson*, the bill was taken in payment of an antecedent debt, and the same remark applies to *Brush v. Scribner*; while in *Townsley v. Summerall* the plaintiff surrendered an antecedent right, or made advances on the faith of the bill. *Hegwood v. Watson* might appear to be in point, but there the maker owed the debt for which the note was deposited as a security by the payee. If A. gives B. a note for his share of a debt due by both, B. may appropriate it to the payment of the debt. In *Bramah v. Roberts*, 1 Bing. N. C. 469, the question was one of pleading, whether the consideration must be set forth specifically in the replication. And although the case of *Pillans v. Van Mierop*, 3 Burrow, 54, might appear to be an authority for the position that a precedent debt is a consideration, the decision really turned on the effect of the defendant's promise in suspending a pre-existing cause of action. The case of *Percival v. Frampton* was assumpsit against the defendant as endorser of a note made by R. S. Atchison. The defendant pleaded that he endorsed the note for the accommodation of Atchison, and that Atchison deposited it with the plaintiff as security for future advances which were not made. It appeared in evidence that Atchison was indebted to the plaintiff, and that the latter had discounted the note, and credited Atchison with the amount. This, as Baron Parke observed, was equivalent to advancing that amount; and although he added that if the note was given as a security for a previous debt, the plaintiff might properly be described as holder for a valuable consideration; this was not the turning point of the cause.

The doctrine of Story has, however, been adopted in many of the State tribunals on grounds of policy and convenience, as tending to facilitate commercial transactions, and enable debtors who have not the means of immediate payment to obtain time to meet their engagements. *The Bridgeport City Bank v. Welsh*, 29 Conn. 475; *The Bank v. Chambers*, 11 Richardson, 657; *Payne v. Bensley*, 8 California, 260; *Sailor v. Daniels*, 37 Ill. 331; *Van Buskirk v. Day*, 32 Id. 260; *Lyon v. Ewing*, 17 Wis. 61; *Curtis v. Moore*, 18 Id. 615; *Allaire v. Harts-horne*, 1 Zabriskie, 665; *Valette v. Mason*, 1 Carter, 288; *Gibson v. Conner*, 3 Georgia, 47; *Molson v. Hawley*, 1 Blatchford, 407; *Pugh v. Durfee*, Ib. 412.

Agreeably to these decisions, the endorsement of a note or bill as collateral security is not merely effectual in passing the title of the endorser, but will defeat the equities by which it was affected while in his hands. Such a transfer was said in *Atkinson v. Brooks*, 26 Vermont, 569, to be a negotiation for value under *Swift v. Tyson* and *Poirier v. Morris*, unless the circumstances were such as to negative every possibility or intendment of consideration, as where the debt for which the instrument is transferred, is not due at the time, and does not mature until after the suit is brought. A similar view was taken in *Fellows v. Prentice*, 12 Smedes & Marshall, 412, and *Carlisle v. Wishart*, 11 Ohio, 172, although the note was taken in both instances as absolute or conditional payment, and the point can hardly be said to have been before the court. The same remark applies to several cases in Massachusetts, where the authority of *Swift v. Tyson* was relied on to sustain a judgment, which might have been based on the obvious principle that the suspension or surrender of one demand is a sufficient cause for the creation of another. See *The Chicopee Bank v. Chapin*, 8 Metcalf, 40; *Blanchard v. Stearns*, 3 Cushing, 152; *Stoddard v. Kimball*, 5 Id. 604, 6 Id. 469. So *Brush v. Scribner*, 17 Conn. 388, and *Norton v. Wate*, 20 Maine, 175, really depend on the principle that the receipt of a note in satisfaction gives birth to a new and valuable consideration arising from the extinction of the antecedent debt, and were said in *Bramhall v. Becket*, 32 Maine, 205, to make against the point for which they were cited in *Blanchard v. Stearns*. And Lord Campbell's dictum in *Poirier v. Morris* (ante, 200), that the case was "the ordinary one of the receipt of a bill as security for a debt," must be taken in connection with the remark of Crompton, J., that the question, whether the receipt of a bill as collateral security is a negotiation for value, did not arise because the evidence was exceedingly strong that the creditor had agreed to give time. In *Austin v. Curtis*, 38 Verm. 64, the question was accordingly said to be still open in Vermont, while in *Roxborough v. Messick*, 6 Ohio, N. S. 448, the court reverted to the doctrine that a transfer as collateral security, is not a negotiation for

value in the sense of the commercial law. In *The Trustees v. Hill*, 12 Iowa, 462, this decision was cited and relied on, and it was said with much truth, that if dicta were disregarded, and the point actually determined kept in view, the authorities in favor of regarding a precedent debt not suspended or extinguished, as a valuable consideration, would be few in number, and outweighed by those on the other side. In *Davis v. Miller*, 14 Grattan, 1, the court inclined in this direction, and when the point was mooted in *Goodman v. Simonds*, 20 Howard, 343, 371, Clifford, J., said that the payment of a prior debt, or an advance made on the faith of a note or bill was a purchase for value, but that the court would not express any opinion as to the effect of the transfer of a note or bill as security for a prior debt, because it was not necessary to the decision of the cause.

In *Merriam v. The Granite Bank*, 8 Grey, 254, the owner of a lost note was held entitled to maintain replevin against the defendants with whom it had been deposited by the finder, unless they could show that the instrument was left in their hands as security for some specific debt or advance, and not for the general balance due by the depositor. The language of the court was vague and general, and can hardly be said to indicate the ground of their opinion, but it is difficult to reconcile the judgment with the views expressed in *Swift v. Tyson*, or the case of *The Bank of the Metropolis v. The New England Bank*, 1 Howard, 264, where an analogous question was decided in favor of the endorsee.

When, however, the question arose in *The Bridgeport City Bank v. Welsh*, 29 Conn. 475, the court said that there was no substantial or legal difference between taking a bill or note in payment of an antecedent debt, and as a security that the debt should be paid, and that the endorsee was entitled to recover in either case whether the instrument was or was not valid in the hands of the endorser. And the recent cases, in Massachusetts, Rhode Island, South Carolina, Illinois and Louisiana, cover the whole ground taken by Mr. Justice Story, and show that the rule for which he contended is now established in those jurisdictions. *The Bank v. Chambers*, 10 Richardson, 457; *The Bank v. Carrington*, 5 Rhode Island, 517; *Cobb v. Doyle*, 7 Id. 380; *Gardner v. Gager*, 1 Allen, 502; *Le Breton v. Pierce*, 2 Id. 8; *Babcock v. Jordan*, 34 Illinois, 14; *Manning v. McClure*, 36 Id. 490; *The Boatmans' Institution v. Holland*, 38 Missouri, 49; *Grant v. Kidwell*, 30 Id. 455; *The Citizens' Bank v. Payne*, 18 Louisiana, 222.

The point is obviously an important one, and something may be said on either side. The obligation implied in the existence of a debt is a good consideration for the assignment of a chose in action as a means of security or payment (ante, 168); 3 Leading Cases in Equity, 368, 3 Am. ed., and the endorsement of a note as collateral security for an antece-



dent debt will consequently pass all the right, title and interest of the endorser, as between the immediate parties, and against third persons. This is true, not only when the debt is due at the time, but when there is a contingent liability which, like that incurred by a principal to a surety or guarantor, may never become an absolute obligation. An assignee for the benefit of creditors may recover all that is really due on the negotiable securities transferred by the assignor, and it is well settled, notwithstanding the case of *Vetterlein v. Howell*, 5 Sneed, 44, where the point was decided the other way, that the endorsement of a note before maturity as security for an antecedent debt, or even as a mere gift or benefaction, is not only valid, but will preclude the maker from relying on a subsequent payment as a defence against the endorsee. *Osgood v. The Thompson Bank*, 30 Conn. 27; *Austin v. Curtis*, 31 Vermont, 64, 68; *Brookman v. Metcalf*, 5 Bosworth, 429; *Davis v. Miller*, 14 Grattan, 1, 16; *Milnes v. Dawson*, 9 Excheq. 448; *Bedell v. Carll*, 33 New York, 581.

A plea that the bill in suit was endorsed by the drawer to the plaintiff without any consideration, that the plaintiff never gave any consideration or value for it, and that after it became due the acceptor paid the drawer, was accordingly held insufficient in *Milnes v. Dawson* as a defence to a suit against the acceptor, and Parke, B., said that it would be altogether inconsistent with the negotiability of such instruments to hold that after the endorser had transferred the right of property in the instrument, he could, by receiving the amount, affect the right of his endorsee. But the title of an assignee is limited to that of the assignor, even in the case of a negotiable instrument, unless the transfer is for value in the ordinary course of business.

Whatever the rule may be in the case of negotiable instruments, it is well settled that a conveyance of lands or chattels as a security for an antecedent debt, will not operate as a purchase for value, or defeat existing equities. 2 *Leading Cases in Equity*, 104, 3 Am. ed. The law was so held in *Morse v. Godfrey*, 3 Story, 363, 390, where Story, J., somewhat inconsistently distinguished the case before him from that of *Swift v. Tyson*, on the ground that the instrument was there taken in satisfaction. In *Culver v. Benedict*, 14 Gray, 7, the transfer of railroad bonds by an agent, in fraud of his principal, as a security for a pre-existing debt, was, notwithstanding, treated as a negotiation for value, entitling the creditor to withhold them from the person to whom they properly belonged; and a similar decision was made in *Babcock v. Jordan*, 24 Illinois, 14, with regard to a mortgage of land. These cases cannot be reconciled with *Bay v. Coddington*, or the principle on which a court of chancery ordinarily proceeds in dealing with antecedent equities (ante, 226). It is generally conceded that an assignee in bankruptcy, or for the benefit of creditors, is not a purchaser, and takes subject to every

defence that would have been good against the assignor. *Billings v. Collins*, 44 Maine, 271, 2 Leading Cases in Equity, 105, 3 Am. ed.

It is well settled that the transfer of a note or bill as collateral security for a contemporaneous sale or advance, is a negotiation for value. *Munn v. McDonald*, 10 Watts, 270; *Griswold v. Davis*, 31 Vermt. 390; *Crispon Bank v. Chapin*, 8 Metcalf, 40; *Fernly v. Pritchard*, 2 Sandford, 151; *Sperling's Appeal*, 19 Barr, 235; *The Bank of New York v. Vanderhost*, 32 New York, 553; *Buchanan v. Metcalf*, Ib. 591; *Tarbell v. Sturtevant*, 26 Vermt. 513; *Curson v. Hill*, 1 McMullen, 76; *Lyons v. Ewing*, 17 Wisconsin, 61; *Curtis v. Mohr*, 18 Id. 615.

Under these circumstances the security is collateral in one sense, but it is essential to the contract, in another, as being a moving cause or inducement, without which, the creditor would not have parted with his goods or assets. *Williams v. Smith*, 2 Hill, 301; *Nichols v. Bates*, 10 Yerger, 429; *The New York Exchange Bk. v. De Wolf*, 3 Bosworth, 86; *Ayrault v. McQueen*, 32 Barb, 365; *Stettheim v. Myers*, 33 Id. 235; *Roxborough v. Messick*, 6 Ohio, N. S. 448; *The Trustees v. Hill*, 12 Iowa, 462, 478; *Goodwin v. McCoy*, 1 Ala. 271. A present consideration is all that the law requires; *Goodman v. Simonds*, 20 Howard, 343, 371; and it makes no difference, as it regards the question of consideration, whether the paper sought to be enforced is to be deemed the principal or only a collateral security. The holder parts with his money or property upon the faith of both, and not of one of them. If he is a holder for value of the principal security, so he is of the collateral. *The Bank of New York v. Vanderhost*, 32 New York, 553, 557.

The principle is the same when time is given for the payment of a pre-existing debt in consideration of a collateral security, because the suspension of the original cause of action is a detriment to the creditor, and he may, therefore, justly be regarded as a purchaser for value. *The Traders Bank v. Bradner*, 43 Barb. 379; *Kirkpatrick v. Muirheid*, 4 Harris, 117; 6 Id. 237; *Depeau v. Waddington*, 6 Wharton, 220, 233 (ante, 161); *Goodman v. Simonds*, 20 Howard, 343, 371. Any consideration, said Clifford, J., in *Goodman v. Simonds*, that would have given validity to the instrument, as between the original parties, will sustain a subsequent negotiation. When, moreover, credit is given on the faith of a promise, that the sale or loan shall be secured by collaterals which are subsequently deposited, the suspension of the cause of action which would have arisen from the non-fulfilment of the promise, is a valuable consideration for the transfer of the collaterals, and the creditor will take them free from antecedent equities. *Rec v. Adams*, 9 Vermont, 213; *Fernly v. Pritchard*, 2 Sandford, 151. A pledge or deposit of the note or bill of a third person as a means of procuring a credit which is subsequently given, is within this principle. *Storts v. Byers*, 13 Iowa, 303; *White v. The Spring-*

*field Bank*, 3 Sandford, 229; *Bancroft v. McKnight*, 11 Richardson, 663; *Spering's Appeal*, 10 Barr, 235; and so is the exchange of one collateral security for another. *Depeau v. Waddington*, 6 Wharton, 220, 234 (ante, 162); *Kirkpatrick v. Muirhead*, 4 Harris, 117; 6 Id. 237; *The Bank of Saline v. Babcock*, 21 Wend. 499; *The Mohawk Bank v. Corey*, 10 Hill, 412; *The New York Exchange Bk. v. De Wolf*, 3 Bosworth 86; *Young v. Lee*, 12 New York, 551; *Stuts v. Byers*, 17 Iowa, 303; *Agrault v. McCullen*, 32 Barb. 305; *Stettheimer v. Meyer*, 33 Id. 255; *Farrington v. The Bank*, 24 Id. 554; *Stotts v. Rogers*, 17 Iowa, 303 (post); *Bond v. Willse*, 12 Wisconsin, 611; *Curtis v. Mohr*, 18 Id. 615.

The distinction between a merely collateral security, and a security given as an inducement to an act which is performed, was accurately drawn in *Depeau v. Waddington*; and again in *Munn v. McDonald*, 10 Watts, 270.

"The use of the term collateral security," said Sergeant, J., "when a debtor transfers to his creditor an article of value, or an evidence of debt, is intended to express, that it is not received in payment of the principal debt, and that it is not an additional right, to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the means of the creditor to realize the principal debt which it is given to secure. It is subsidiary to the principal debt—running parallel with it—collateral to it—and when collected, is to go to the credit of the principal debt; or if the principal debt be paid off, the debtor is entitled to a restoration of the collateral security. But though a thing may be given as collateral security, the rights of the creditor in it, as against third persons, must depend on other considerations, and may vary with the circumstances of each particular case. If one delivers to his creditors, as collateral security, a negotiable note, already endorsed by several endorser, there can be no other meaning in such a transaction, than that the creditor shall enjoy all the remedies on the note, which the law gives him as holder, and the state of the parties to that note is in nowise changed by its being taken as collateral security. Such holder may recover from the last endorser, as well as the others, and such last endorser, in that case, may recover against a prior endorser, or the maker, free in either case from any defence on the ground of want of failure of consideration between the maker and the payee. Now that was the case before us. The plaintiff received the note as collateral security for Gass's note, *bona fide*, and for a valuable consideration, paid or advanced at the time. He received it as endorsee, with two endorsements upon it, besides that of the payee; and it is even proved, that he looked mainly to the security of one of these endorser, and that it was at his instance the suit was instituted against the maker. The jury would be warranted in inferring from the evi-

dence, that Gass procured the endorsements for the purpose of delivering them to the plaintiff, for the receipt of the plaintiff specifically mentions the endorsements, as upon the note at the time he received it. The plaintiff must be considered as receiving the note, not as the immediate endorsee of Gass, but of the last endorser, and Gass as the agent to hand it over to the plaintiff. To allow the defendant to interpose the defence he sets up, would deprive the plaintiff of the security contemplated by him when he agreed to accept the note, with the endorsements then existing upon it. Although, therefore, the note was given and received expressly as collateral security, yet the plaintiff stands in the position of a holder for value and without notice, of an instrument of such a nature, that we are of opinion, he is entitled to recover against the maker, free from any equity between the original parties." A similar view was taken in *Roxborough v. Messick*, 6 Ohio, N. S. 448.

"When," said Swann, J., "the note is transferred as collateral security and for value, such as a loan or further advancement, or a promise, express or implied of time to pay a pre-existing debt or the like, the assignee will be protected from infirmities affecting the instrument before it was thus transferred. If, however, the note is transferred as collateral security to a pre-existing debt, without any consideration, so that the transfer is a mere voluntary act on the part of the debtor, and is received by the creditor without incurring any new responsibility, parting with any right, or subjecting himself to any loss or delay, and leaving the subsisting debt precisely in the condition it was before such transfer, the holder has not taken the note for value, nor in the usual course of trade. To hold otherwise, would be a departure from the established rules of law governing the rights of parties to negotiable paper, and losing sight of the grounds of public policy, upon which the law is founded."

It is not requisite that the agreement should be express, or on mutual promises of any kind. *Depeau v. Wadlington* (ante); *White v. The Springfield Bank*, 3 Sandford, 222; *Griswold v. Davis*, 31 Vermont, 390; *Alkinson v. Brooks*, 28 Id. 569. If a security be deposited with the view of obtaining a credit which is subsequently accorded, the law will imply a request; and it is a familiar principle that a request followed by performance, confers a right of action (ante, 95). "It has been urged," said Duer, J., in *White v. The Springfield Bank*, "that there is no positive evidence that any of the subsequent drafts were discounted upon the faith of the note. But we are clearly of opinion that no further evidence of this fact was necessary to be given than was actually produced. It was sufficient to prove the general agreement that collateral securities were to be applied to unaccepted drafts, and we are bound to presume that every such draft was discounted in reliance upon this

agreement, and it is a necessary consequence of this presumption, that the note of the plaintiffs was held and considered by the bank as an independent security." A similar presumption was indulged in *Bos-anquet v. Dudman*, 1 Starkie, 1 (ante), and *Sperling's Appeal*, 10 Barr, 275.

The case of *Austin v. Curtis*, 31 Vermont, 64, does not contravene these principles. A surety will not be discharged by mere forbearance, nor unless the creditor binds himself not to proceed against the principal; but forbearance in pursuance of a request for time, is a valuable consideration, although there be no promise to forbear (ante 100). Notes to *Pain v. Packard* (post); *Clark v. Russell*, 3 Watts, 213. In *Griswold v. Davis*, 31 Vermont, 390, it was said that from the mere acceptance of a note or bill payable at a future day as a security, the law will imply an agreement for forbearance until the instrument matures; but this dictum goes too far; (see *Austin v. Curtis*; Notes to *Okie v. Spencer*, post;) and the true statement of the proposition is, that giving such a security is a request for time and will give rise to a consideration if fulfilled. See *Atkinson v. Brooks*, 26 Vermont, 569 (ante, 231).

It was held in *Jenness v. Bean*, 10 New Hampshire, 200, that a collateral security is not within the scope of the consideration given for the principal obligation, and that the taker will not be a purchaser for value, even when he gives value at the time. A similar view was taken in *Smith v. Babcock*, 1 Woodbury and Minot, 246. This inference is manifestly erroneous. Taking a note or bill as collateral, neither constitutes nor excludes a consideration; *Depeau v. Waddington*; nor does it negative the favorable presumption which attends on negotiable instruments. Evidence that such was the nature of the transfer will not, therefore shift the burden of proof, or render it incumbent on the plaintiff to show that he gave value for the note. *The Trustees v. Hill*, 12 Iowa, 462

Taking a note as security for an antecedent or contemporaneous debt, is, as the term implies, a purchase only so far as may be requisite for protection of the creditor, and when the consideration fails as between the original parties, he cannot recover more than the sum due on the principal obligation. *Stoddard v. Kimball*, 5 Cushing, 604; 6 Id. 469; *Appleton v. Donaldson*, 3 Barr, 381; *Atkins v. Buck*, 36 Vermont, 569; *Grant v. Kidwell*, 30 Missouri, 455. The law is so held to prevent the circuity of action which would inevitably result from the opposite doctrine. *Tarbell v. Sturtevant*, 26 Vermt. 513. When, however, there was no defence against the prior holder, judgment will be given for the full amount of the collateral.

We have seen that a precedent debt is not a consideration for the execution of a note or bill (ante, 204). In *Goodman v. Simonds*, 26 Howard, 343, 371, Clifford, J., said that in respect to parol contracts,

there was in general but one measure of the sufficiency of a consideration, and whatever would give validity to a bill in the first instance would uphold a subsequent transfer. It follows conversely that when the consideration fails as between the the original parties, transferring the instrument to a third person as collateral security for such a debt, will not remedy the defect. Obviously, an instrument which would be without consideration if it came directly from the maker, cannot be rendered valid by passing through the hands of an intermediate holder who gives no consideration.

On the other hand it seems hard and unreasonable to compel the creditor to elect between entering into a binding agreement to give time which will discharge sureties and endorsers, and foregoing the benefit of the collateral security tendered by the debtor. A request for time, followed by forbearance, is a valuable consideration, and the transfer of a note or bill as collateral security for a pre-existing debt, may justly be viewed as equivalent to such a request.

The motive for giving the security is to induce indulgence, and the creditor may be presumed to be influenced by it in delaying to collect the debt. Accordingly, in *Atkinson v. Procks*, 26 Vermont, 569, Redfield, J., suggested that the dicta in *Swift v. Tyson*, might be reconciled with the general rule that to constitute a consideration, something must be given or relinquished, by regarding the transfer of a collateral security as a request for time, and, therefore operating as a contract if the creditor complies. A similar view was taken in *Manning v. McClure*, 36 Illinois, 496, 497, and forbearance on the faith of a collateral said to be a valuable consideration. The argument is refined, and the best, if not the only explanation of the difficulty which the books afford. See *Griswold v. Davis*, 31 Vermont, 390.

It was held at one period in New York, that the transfer of a note or bill in satisfaction of a pre-existing debt is not a negotiation for value, because the creditor parts with nothing on the faith of the instrument. This view, which seems to have originated in the dicta of the Court of Errors in *Bay v. Coddington*, 5 Johnson's Ch. 54, 20 Johnson, 667; was followed in a long train of decisions coming down to a comparatively recent period; *Wardle v. Howell*, 9 Wend, 176; *Rosa v. Brotherton*, 10 Id. 86; *The New York Bank v. Worthington*, 12 Id. 593; *Payne v. Cutler*, 13 Id. 605; *Stalker v. McDonald*, 6 Hill, 93; *White v. The Springfield Bank*, 1 Baib. 935; *Stewart v. Small*, 2 Id. 559; *Mickles v. Cavan*, 4 Id. 304; *Spear v. Myers*, 6 Id. 145; *Farrington v. The Frankford Bank*, 24 Id. 554; *Francis v. Joseph*, 3 Edwards' Ch. 82; *Clark v. Ely*, 2 Sandford Ch. 168; and the same rule prevails in Tennessee, *Napier v. Eland*, 5 Yerger, 108; *Wormley v. Lowry*, 1 Humphreys, 468; *Vanwyck v. Norval*, 2 Id. 192; *Ingram v. Varden*, 3 Id. 37; *Ingram v. Morgan*, 4 Id. 66; *King v. Doolittle*, 1 Head, 77.

In *Rosa v. Brotherton*, the court gave the following reasons for setting aside the verdict and ordering a new trial: "The judge charged the jury, that it was immaterial, whether the note was negotiated in payment of a precedent debt, or for a valuable consideration paid at the time. This is certainly not the law as settled by the court for the correction of errors in the case of *Coddington v. Bay*, 20 Johns. Rep. 637. Mr. Justice Woodworth there states the rule to be thus, that where negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner, but that the valuable consideration which shall produce this effect, is not merely such a consideration as is good between the party transferring and the party receiving such paper. The holder must have incurred loss by giving credit to the paper, and have paid a fair equivalent; he must have made advances or incurred responsibilities upon the credit of the paper."

"If the holder has done neither, but has taken it for a previous claim, his condition is improved if he recovers, but he loses nothing if he fails; his equity is not superior to the owner. Chief Justice Spencer remarks, that all the cases cited were, where notes or bills were taken in the usual course of trade, and for a present consideration paid when they were received; not as a security for an antecedent debt. The holder to recover, must have paid a valuable consideration by giving money, or money and goods, for them in the usual course of trade. It follows, from the principle thus asserted, that the holder of a note negotiable on its face, who receives it in payment of a precedent debt, or responsibility incurred, takes it subject to all the equities existing between the original parties. In the language of the commercial law, he has not paid value for it, and therefore is in no better situation than the payee. Since the case of *Coddington v. Bay*, this principle has not been departed from. The plaintiff, in this case, gave no value for the note. He loses nothing if the defendant succeeds in his defence. He gave nothing for the note, advanced nothing, nor incurred any responsibility upon its credit. He has no equity superior to that of the maker, and in such case, the law leaves him in possession who already has it."

When the question arose in *Stalker v. McDonald*, 6 Hill, 93, the chancellor said that the transfer of a note, as security for, or nominally in payment of, a pre-existing debt, did not entitle the creditor to protection as a *bona fide* purchaser. By nominal payment, the chancellor presumably intended conditional payment, and cannot be supposed to have intended the absolute payment of which results from an accord and satisfaction. See *White v. The Springfield Bank*, 3 Sandford, 222; *The Seneca County Bank v. Kneass*, 5 Denio, 329; *Youngs v. Lee*, 18 Barb. 127, 12 New York, 531. A creditor

who foregoes all right to proceed against the debtor, in consideration of receiving the obligation of a third person, is obviously as much a purchaser as if he had parted with value in any other form. Accordingly, in the *Bank of St. Albans v. Gilliland*, 23 Wend. 317, taking a note for a precedent debt was said to be a negotiation for value within the law-merchant, if it is taken in satisfaction and the evidence of the debt cancelled.

In like manner, a creditor who discounts a note at the instance of a debtor, and credits him with the proceeds, will acquire a title free from antecedent equities. *The Bank of Sandusky v. Scovell*, 24 Wend. 115. Bronson, J., said that if the debtor had received the money and used it to pay the debt, the transaction clearly would have been a purchase for value, and the principle was the same where the fund was appropriated at his instance by the creditor. These distinctions were criticised in *Stewart v. Small*, 2 Barb. 559, and *Spear v. Myers*, 6 Id. 445; and a new and distinct consideration said to be indispensably requisite to give the endorsee of a negotiable instrument a superior right to that of the endorser, while in *Dickson v. Tillinghast*, 4 Paige, 215, the conveyance of land in satisfaction of a debt was held not to free it from antecedent equities. See *The Metropolitan Bank v. Godfrey*, 23 Illinois, 306; *Manning v. McClure*, 36 Id. 490.

It is, however, established that the surrender or cancellation of one security is a valuable consideration for the negotiation of another. *Goodman v. Simonds*, 20 Howard, 343, 371. This is universally conceded when the instrument which is given up or cancelled bears the name of a third person; *Nicholas v. Bates*, 10 Yerger, 349; *The Bank of Salina v. Babcock*, 21 Wend. 499; *The Mohawk Bank v. Corry*, 1 Hill, 513; *White v. The Springfield Bank*, 3 Sandford, 222; *Farrington v. The Frankford Bank*, 24 Barb. 554, 564; and is equally true when the creditor extinguishes the right of recourse against the debtor by taking the note of a third person as absolute payment. *Youngs v. Lee*, 18 Barb. 187, 12 N. Y. 531; *Stettheimer v. Myer*, 33 Barb. 215. It has, however, been said that the case is different when the new or substituted security bears the name of the debtor, because his liability continues under another form, and the position of the creditor is not sensibly varied for the worse. See *Wormley v. Lowry*, 1 Humphreys, 468. This view is, as the case of *The Bank of St. Albans v. Gilliland* indicates, refined, rather than just.

The deduction from the authorities in New York as a whole would accordingly seem to be, that the acceptance of a note in absolute satisfaction for a precedent debt will discharge prior equities, not only where the bond or other instrument by which the debt is evidenced is surrendered or cancelled, (*Youngs v. Lee*, 12 New York, 551; *Meads v. The Merchants' Bank*, 25 Id. 143; *New York Exchange Bank v. De*



*Wolf*, 3 Bosworth 36; *Farrington v. The Frankford Bank*, 23 Barb. 554;) but where it is shown by any other unequivocal means of proof that the creditor took the note in absolute payment or satisfaction. *White v. The Springfield Bank*, 3 Sandford, 332; *The New York Works v. Duer*, 4 Smith, 52; *Gould v. Sieckle*, 5 Id. 260; *Scott v. Betts*, Hill & Denio, 363; *Brown v. Leavitt*, 31 New York, 113; *Struthers v. Kendall*, 5 Wright, 214, 218.

In like manner, when the effect of taking a note or bill "for and on account," of an antecedent debt, or as conditional payment, is to discharge sureties or endorsers by suspending the right of suit, there is a new and distinct consideration, and the transaction will operate as a negotiation for value under the rule prevailing in New York. *Myers v. Welles*, 5 Hill, 463; Notes to *Okie v. Spencer* (post); *The Bank v. Bradner*, 43 Barb. 379, 393. The result should be the same on principle when the creditor suspends his existing rights and remedies by withdrawing an execution, or giving time in any other way. In *Boyd v. Cummings*, 17 New York, 101, a note endorsed as security for the payment of a judgment, in consideration of the suspension of proceedings for the collection of the debt, was accordingly held to be negotiated for value. An agreement for time, in consideration of a negotiable instrument transferred by the debtor, is in like manner, a valuable consideration moving from the creditor; *The Traders' Bank v. Bradnor*, 43 Barb. 379; and such an agreement is *prima facie*, implied under the law of merchant, in taking a negotiable instrument as conditional for payment.

When, however, the question arose in *Lawrence v. Clark*, 39 New York, 129, the court held that a note taken in payment or satisfaction of an antecedent demand, is not a negotiated value unless the creditor surrenders some security, or parts with some existing right, other than the demand itself. "It was held," said Boeckes, J., "in the leading case in this State, of *Coddington v. Bay*, 5 Johns. Ch. 54; 20 Johns. 637, that the holder to be protected against latent equities, must have parted with something of value at the time the note was received, in money or property, or must have incurred some responsibility, or relinquished some right on the faith of it. The numerous decisions bearing on this question, were all carefully considered in *Farrington v. The Frankfort Bank*, 24 Barb. 554; and it was there determined that the rule laid down in *Rosa v. Brotherson*, 10 Wend. 85, and in *Payne v. Cutler*, 13 Id. 605, to the effect that when a creditor receives the transfer of a negotiable note, in payment of a precedent debt, without giving up any security, takes it subject to all equities existing between the original parties, was the settled law of this State. I am not aware of any more recent case, holding in hostility to this rule. In *Brown v. Leavitt*, 31 New York, 113, a security was surren-

dered on receiving the new note. In *Boyd v. Cummings*, 17 New York, 101, a right was relinquished. In *Ayrault v. McQueen*, 32 Barb. 305, security was surrendered. In *Stettheim v. Myers*, 33 Barb. 215, a note was surrendered and money paid. In *Cardwell v. Hicks*, 37 Barb. 458, the note was taken for a precedent debt and for cash paid. It was held, that the party could recover only for the amount of cash advanced. In *Chesbrough v. Wright*, 41 Barb. 28, it was held that the receiving a note in part payment of a precedent debt, did not constitute a parting with value, which would render the holder a *bona fide* holder for value. In *Webster v. Van Steinburg*, 46 Barb. 212, it was held that to constitute a person a *bona fide* purchaser, he must have received the instrument upon some new consideration advanced at the time, or must have relinquished some security for a pre-existing debt due him. 32 New York, 553, 557; 34 Id. 247. It seems, therefore, perfectly well settled, that the receiving a note on a precedent debt, without surrendering or relinquishing any security or right in regard to it, will not constitute a person a *bona fide* holder so as to shut out equities which might be insisted on against the prior owner."

The rule that the transfer of a bill or note as security for an antecedent debt, will not raise the title of the endorsee higher than that of the endorser, meets with an exception where the instrument is executed for the accommodation of the payee, with a view of enabling him to obtain credit from third persons. Under these circumstances there is no fraud or failure of consideration, and consequently nothing to constitute an equitable defence. In *Appleton v. Donaldson*, 3 Barr, 381, the making or acceptance of a negotiable instrument for the accommodation of the payee, was held to be a loan of the credit of the maker, without restriction as to the way in which it should be applied, and in *Lord v. The Ocean Bank*, 8 Harris, 334, Black, C. J., said, that a man who chooses to put himself in the front of commercial paper for the use of his friend, must abide by the consequences, and is as much bound by a pledge of the instrument for an antecedent debt, as if it were used in any other way. It is accordingly well settled that a creditor who takes such an instrument as security for a pre-existing demand, acquires a right which he may enforce notwithstanding the want of a consideration as between the original parties. *Struthers v. Kendall*, 5 Wright, 214, 227; *The East River Bank v. Butterworth*, 45 Barb. 476; *Cole Saulpaugh*, 48 Id. 104; *Schepp v. Carpenter*, 49 Id. 542; *Kimbro v. Lytle*, 10 Yerger, 417; *Gordon v. LeRoy*, 2 Paige, 509; *Lathrop v. Morris*, 5 Sandford, 7; *The Bank of Rutland v. Buck*, 5 Wend. 66; *Appleton v. Donaldson*, 3 Barr, 381; *Snyder v. Wilt*, 3 Harris, 59, 64; *Lord v. The Ocean Bank*, 8 Id. 384; *Work v. Kase*, 10 Casey, 138; *Moore v. Baird*, 6 Id. 138; *The Washington Bank v. Keene*, 15 Iowa, 33.

It is not easy to reconcile these decisions with the doctrine that the

debt of another is not a consideration for a promise, *Crofts v. Beale*, 11 C. B. 172, *Mecorney v. Stanley*, 8 Cushing, 85 (ante, 204). Accordingly in Maine and Kentucky, the holder of an accommodation note cannot as it seems, recover, unless he is a purchaser for value in the ordinary sense of the term. *Bramwell v. Stuart*, 31 Maine; *Thompson v. Poston*, 1 Duvall's Ky. 389; and this would also seem to be the English doctrine. *Crofts v. Beale*.

If the pre-existing debt of a third person be not a sufficient consideration for a note when made directly to the creditor, the instrument cannot acquire validity by passing through the hands of the debtor. The better opinion would consequently seem to be, that if a man is willing to assume the debt of another, and gives his note accordingly, he will be bound whether it is taken in satisfaction or as a collateral security.

The rule applies a *fortiori*, where the plaintiff makes an advance or gives credit on the faith of the security in any other form, and it will make no difference that he knows that the maker or acceptor signed the instrument without consideration, and for the benefit of the other parties. *Myer v. Beardslee*, 1 Vroom, 236; *Fulweiler v. Hughes*, 5 Harris, 44; *Moore v. Baird*, 6 Casey, 138; *The East River Bank v. Butterworth*, 45 Barb. 476; *The Bank of New York v. Vanderhorst*, 1 Robertson, 211.

Agreeably to the view taken in New York, the purchase of an accommodation note or bill, is a loan to the payee on the credit of the maker or acceptor, limited to the sum actually advanced and within the provisions of the statutes against usury. *Clark v. Sisson*, 22 N. York, 12. The holder cannot therefore rely on his ignorance of the nature of the instrument, or the assurances of the payee that it is business paper, as a reason why usury should not be pleaded as a defence by the maker. *Daves v. Schutt*, 2 Denio, 624; *Hall v. Wilson*, 10 Barb. 548; *Hull v. Earnest*, 36 Id. 585; *Arby v. Rapelye*, 4 Hill, 10.

In *Clark v. Sisson*, Comstock, C. J., said that in point of law, the transaction was an usurious loan of money. It was a loan because it could not be anything else. The plaintiffs could not purchase a bill which had no owner; in other words, which had no legal existence until it came to their hands. It was true, that the words value received were part of the instrument, and that those words imported that the bill was drawn and accepted for value in the hands of the drawee. It might also be assumed that the plaintiffs believed that they were purchasing a binding obligation. But these circumstances did not vary the case. Neither the drawer nor acceptor made any representation to the plaintiff beyond the language contained in the contract itself. If the words of a contract were to be taken as a representation which precluded the contractor from interposing a defence at variance with

what was there said, then all contracts must be deemed to be valid, which appeared to be so on their face, and usury, duress, or fraud could no longer be alleged. *The Mechanics' Bank v. The New Haven Rail Road Company*, 6 Kernan, 638.

Such is clearly the rule as between the original parties, but it does not necessarily apply as against a purchaser for value, unless the contract is avoided by some statutory prohibition or rule of public policy which is broad enough to include him. The question would seem to be whether the purchase of an accommodation bill in good faith is a loan within the provisions of the statutes against usury. If it is, no representation debors the instrument or on its face, should be allowed to make the contract valid contrary to the meaning of the statute.

This course of decision is the less consistent, because it has been held that a collateral declaration that a note is given for value and in the usual course of business, will preclude the maker from setting up usury as a defence against a third person who gives value on the faith of such assurance *Middleton Bank v. Jerome*, 18 Conn. 443; *Sargent v. Sargent*, 18 Vermont, 371; *Lynch v. Kennedy*, 34 New York, 151. It is accordingly held by the Courts of Pennsylvania, and in some of the other States, that the holder of an accommodation note may recover the whole amount from the maker, although he bought the instrument at a greater discount than the legal rate of interest. *Gaul v. Willis*, 2 Casey, 269; *Moore v. Baird*, 6 Id. 138; *Vinton v. Peck*, 14 Mich. 287; *The Washington Bank v. Crum*, 15 Iowa, 53.

It is, however, universally conceded that when a bill or note is taken as collateral, and there is a defence as between the original parties, the recovery cannot exceed the amount of the debt or liability which the instrument was designed to secure. *Appleton v. Donaldson*, 3 Barr, 381; *Atkins v. Buck*, 36 Vermont, 569; *Lore v. Brown*, 2 Wright, 307; *Grant v. Kidwell*, 30 Missouri, 455; *Citizens' Bank v. Payne*, 16 Louisiana, 222. A tender of the amount advanced on the faith of an accommodation note, is accordingly a defence to an action against the maker. *Appleton v. Donaldson*, 3 Barr, 381, 388. And it was said in this instance, that the defendant might rely on his position as a surety, as a reason for not pleading the tender, or bringing the money into court.

It has also been held, and would seem clear on principle, that the mere circumstance that an accommodation note or bill was overdue when transferred, will not preclude a recovery against the maker or acceptor, because the instrument is still applied to the use for which it was made, and there is no antecedent equity to affect the title of the holder. *The East River Bank v. Butterworth*, 45 Id. 476; *Corbett v. Miller*, 43 Barb. 305; *Thompson v. Shepherd*, 12 Metcalf, 311. And such would also seem to be the rule in England. *Charles v. Marsden*,

1 Taunton, 224; *Stein v. Yglesias*, 1 Cr. M. & R. 565; *Sturtevant v. Forde*, 4 M. & G. 101.

The point was, however, decided the other way in *Bower v. Hastings*, 12 Casey, 285, and *Hoffman v. Foster*, 7 Wright, 137, apparently on the ground that the implied authority to use the instrument as a means of obtaining credit ceases when it matures. And there can be no doubt that when such a bill is paid at maturity by the acceptor, it will be invalid in the hands of a subsequent holder. *Parr v. Jewell*, 16 C. B. 684.

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NOTE OR BILL TAKEN ON ACCOUNT OF DEBT.

TOBEY v. BARBER.

In the Supreme Court of New York.

NOVEMBER, 1809.

[REPORTED, 5 JOHNSON, 68-72.]

*Where A. being indebted to B. for two quarters' rent on a lease, gave to B. the note of C. for part of the amount, and paid the residue in money, and B. endorsed a receipt on the lease, as having received the amount in full for the rent; and the note not being paid, B. afterwards brought an action of covenant for the rent; it was held, that the receipt, though absolute in its terms, was not conclusive evidence of the payment; and that parol evidence was admissible to show that the note was part of the sum included in the receipt.*

*Parol evidence is admissible to explain or contradict the terms of a receipt.*

*A note is not an extinguishment or payment of a precedent debt, unless there is an express agreement to accept it in payment, and to take the risk of the solvency of the maker.*

THIS was a suit on a lease, dated the 17th of November, 1802, executed by the plaintiff to the defendant, by which he leased to the defendant a dwelling house, barn, and saw-mill, &c., in Catskill, for two years from the date of the lease, for the sum of 800 dollars, 100 dollars to be paid every three months. The suit was brought on the *covenant* to pay the rent, and for the non-payment of the 100 dollars, due successively, on the 17th August, 1803, the 17th November, 1803, and the 17th February, 1804. The plea was

the general issue, with notice of payment. The cause was tried at the Columbia circuit, in October, 1808, before Mr. Justice Spencer.

At the trial, the lease was admitted, and the defendant gave in evidence several *receipts* of the plaintiff, endorsed on the counterpart of the lease. The receipt of the plaintiff to the defendant, dated the 24th of September, 1803, was as follows: "Received of Ralph Barber, 163 dollars, on account of the within lease, and in full for the second and third quarters' rent." The receipt of the plaintiff, dated the 25th of February, 1804, was as follows: "Received of Uriah Coffin, five turnpike shares, deposited with Uriah Coffin, by Ralph Barber, for me, for the last quarter's rent, due of Ralph Barber, before the assignment, agreeable to the within lease, the said shares being in the Scholharie turnpike."

An assignment was produced, dated 19th November, 1803, by which the defendant assigned the lease to Uriah Coffin; and the plaintiff, on the same day, under his hand, certified that he agreed to the assignment. On the 27th of February, 1804, Coffin assigned and gave up the lease to the plaintiff.

The plaintiff then offered to prove, that the defendant had procured Coffin to give a *note*, payable to the plaintiff or order, for 115 dollars and 68 cents, at the bank of Columbia, in four months, and dated the 24th September, 1803, as part of the receipt of that date; and that Coffin failed before the note became due, and took the benefit of the insolvent act, and that the note was not paid. This evidence was objected to but admitted.

The plaintiff then offered to prove that the turnpike shares were received, not as payment, but upon the condition expressed in a letter of the defendant. This evidence was objected to but admitted. The letter was dated the 17th of February, 1804, and stated, that the plaintiff might receive the shares of Coffin, and keep them until April, when he should be at Hudson, and would redeem them. The plaintiff proved, that the shares were called for by him, and received in pursuance of the letter, and on the terms therein expressed. He next proved the low value of the turnpike shares.

The judge charged the jury that a receipt was not conclusive evidence, but might be explained by *parol*; and that the *note* not being paid, it did not operate as an extinguishment of the rent due under seal; that the receipt for the shares did not purport to be a receipt in full, and that it appeared from the evidence, that

they were received upon the condition expressed in the letter. The jury found a verdict for the plaintiff, for 252 dollars and 50 cents, being the deficiency in the three quarters' rent.

A motion was made for a new trial: 1. Because the parol evidence, as to the receipts was inadmissible. 2. That the note, being given by a third person to the plaintiff, was an extinguishment of the debt for which it was given. 3. For the misdirection of the judge.

*Van Buren*, for the defendant. 1. Admitting that a receipt is not conclusive evidence; yet the rule applies only in cases of fraud or mistake. Where there has been any fraud or deception, or where there is a mistake or omission in the account or sum for which the receipt is given, parol evidence has been received. But here no fraud or mistake is pretended. Parol evidence is never admissible to vary the substance of, or to contradict a writing.

2. But there was sufficient evidence to show, that the plaintiff took the note of Coffin in absolute payment. The plaintiff knew the insolvent situation of Coffin at the time; and the endorsement of the receipt on the back of the lease, without any condition or limitation, and in full of the rent, is conclusive evidence of its being received in payment. A receipt for the last quarter's rent is conclusive, as to all the previous quarters. At least it ought to have been left to the jury, as a question of fact, whether the plaintiff did not take the note in absolute payment. The receipt for the turnpike shares was in full of the last quarter's rent. The letter was not conclusive proof that the shares were in fact received conditionally, or as security. The terms of the receipt contradict that idea, and the testimony of the two witnesses is balanced.

*Parker*, contra. Receipts are not those written instruments against which no parol evidence is to be received. Parol evidence may be admitted to explain or vary a receipt. The note was no extinguishment of the rent; nor was it payment unless actually paid, or unless there was a specific agreement that it should be payment. If a landlord takes a bond for rent, and the bond is not paid, it is no extinguishment of the rent. If a stranger gives a bond for the simple contract debt of another, it is no extinguishment of the debt.

[VAN NESS, J. The question is not whether there was an extinguishment of the rent ; but whether the note was accepted in payment.]

I contend, then, that there is no evidence of such an acceptance.

*Fraser*, in reply. In the first receipt, the amount of the note was included with money paid. It was improper to admit evidence of the fact of the notes being a part of the sum, for it contradicts the very terms of the receipt. I admit the general rule, that a note given for a precedent debt is not payment ; but here a receipt in full has been given, and with full knowledge of the circumstances of the note. The plaintiff held this note near a year ; and after the maker had become insolvent, he gave another receipt for the turnpike shares, in full for the last quarter's rent. The words of the receipt are express and absolute ; there is nothing from which to infer any condition. Where an agreement is reduced to writing, parol evidence is inadmissible to contradict it. The receipt contains the written agreement of the party to accept the shares in full satisfaction of the rent.

[SPENCER, J. Suppose a receipt given for bank notes, which afterwards proved to be forged, would that be conclusive evidence of a payment ?]

That would be a fraud, and therefore no payment ; for it is admitted, that where there is fraud or mistake, the receipt may be explained. If there was any condition, it ought to have been mentioned in the receipt. You cannot, afterwards, vary the terms of a writing, deliberately made and signed by the party.

*Per Curiam*. It has been repeatedly held in this court, that a receipt is an exception to the general rule, that a writing cannot be explained or contradicted by parol. (1 Johns. Cas. 145. 2 Johns. Rep. 378.) The grossest abuses and fraud would be practised upon the ignorant and unwary, if receipts were to be deemed conclusive, and not open to examination. The weight of this inconvenience has been felt and avoided in other courts as well as in our own. (2 Term. Rep. 866 ; 5 Ves. 87. 1 Peters's Adm. Rep. 179, 180.) The parol evidence was, then, admissible in this case, to show that the receipt of the 24th of September, 1803,



though purporting to be in full for two quarters' rent, was founded partly on a note given by one Coffin to the plaintiff, by the procurement of the defendant; and that Coffin became insolvent before the note fell due, by which means the note was not paid. The taking of the note was no extinguishment of the debt due for the rent. It is a rule well settled, and repeatedly recognised in this court, that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of *laches* in not presenting it for payment in due time. He is not obliged to sue upon it. He may return it when dishonored, and resort to his original demand. It only postpones the time of payment of the old debt, until a default be made in payment of the note. (1 Salk. 124. 5 Term. Rep. 513. 6 Term. Rep. 52. 7 Term. Rep. 66. 1 Esp. N. P. 3. 1 Cranch. 181. Herring v. Sanger, January term, 1802, and Roget v. Merritt and Clapp, 2 Caines, 117.) There is no evidence in this case, that the plaintiff agreed to run the risk of the solvency of Coffin, and to take the note as absolute payment, except it be in the inference arising from the receipt itself, and that is not enough to establish such a positive agreement. The case of Murray v. Gouverneur & Kemble, which was decided in the Court of Errors, in February, 1800, on an appeal from a decree in chancery, is in point, as to the question before us; for it is to be observed, that the rules of evidence are generally the same in cases of law and of equity. It was there decided, that receipts were explainable, and that a bill was not a discharge of a precedent debt, unless by express agreement; and that a receipt of a bill as cash was still not sufficient evidence that the bill was taken as an absolute payment.

As to the receipt for the turnpike shares, it does not, even on the face of it, purport that those shares were taken as an extinguishment of the rent; and the parol evidence is decisive that they were offered by the defendant, and received by the plaintiff, as a security merely.

The motion for a new trial must therefore be denied.

Motion denied.

## DAYTON v. TRULL.

In the Supreme Court of New York.

MAY, 1840.

[REPORTED, 23 WENDELL, 345-349.]

*When a bill of exchange drawn by the debtor on a third person, is taken by the creditor on account of the debt, with a stipulation that it shall be in full when paid, he cannot recover in a suit brought for the debt, without showing that the bill is still in his hands and unpaid, and proving, or excusing a presentment for payment at maturity, and notice of non-payment to the debtor.*

*It seems, that in such a suit the plaintiff cannot recover, without proving all that it would be necessary to prove in a suit brought directly on the bill.*

\* THIS was an action of debt on a judgment against the defendant, in support of which the plaintiff gave the record of the judgment in evidence. The following receipt was then produced by the defendant, who relied on it, as a prima facie defence to the action. "Supreme Court, J. Dayton v. W. Trull, Jr.—Rec'd 15 February, 1832, of the def't, fifty dollars in cash, and his draft on C. Price, Jr., for one hundred and seventy five dollars, one year from date, with interest from this date, which, when paid, will be in full satisfaction of the judgment in this cause; the amount of the judgment being two hundred and seventy-five dollars and ten cents, with interest from the 17th August, 1829." It was, however, ruled by the judge before whom the case was tried, that this receipt was not a defence, without showing that the draft on Price had been actually paid. A verdict having been given for the plaintiff, a motion was made for a new trial.

*S. Stevens*, for defendant.

*A. Tuber*, for plaintiff.

\* The syllabus and statement of the reporter are omitted.

*By the Court, BRONSON, J.* The plaintiff cannot recover the full amount of the judgment, without giving some account of the bills. He should, at least, have produced and cancelled them on the trial, or shown what had become of them. For aught that appears, they may have been paid by the drawee, or be now outstanding, and the defendant liable as drawer to some third person to whom the bills may have been negotiated.

The plaintiff insists that the *onus* lies on the defendant, and that he must show the bills paid, before he can claim any deduction from the amount of the judgment. But I think otherwise. The drafts were all payable several years before the trial, and until they are accounted for, the reasonable presumption is, that they were either accepted and paid, or that the defendant has been discharged by the *laches* of the holder. Although, according to the terms of the receipt, the bills were not to operate in satisfaction until paid, it was the duty of the plaintiff to present them, and until he shows such a state of facts as would authorize a recovery on the bills themselves, he cannot recover on the original consideration for which they were given.

In *Jones v. Savage*, 6 Wendell, 658, the bill was given for goods purchased, and the holder having neglected to present and give notice, it was held that he could neither recover on the bill, nor on the count for goods sold. *SAVAGE, C. J.*, said, it may be that the holder of the bill, when it fell due, made it his own by omitting to demand payment and give notice. It may be that the defendant had funds in the hands of the drawee, with which it would have been paid if presented. He added, that it was not like the ordinary case of a note given for goods, which may be cancelled on the trial, and recovery had for the original consideration. It was said, in this case, that the bill was received in payment for the goods, but I do not see that this can alter the principle. Whether received as payment, or on an agreement to apply the money when collected, the duty of presenting the bill results from the nature of the security. It purports to be a transfer of funds which the drawer has in the hands of the drawee, and there is an implied undertaking on the part of the holder that he will take the proper steps to have those funds applied to the satisfaction of his debt.

It was admitted in *Tobey v. Barber*, 5 Johns. R. 68, that the note of a third person, received on account of a pre-existing debt, may operate as payment if the creditor parts with the note, or is

guilty of *laches* in not presenting it for payment in due time. It was added, that the creditor need not sue upon the note—he may return it when dishonored, and resort to his original demand. In *Smith v. Wilson, Andrews*, 187, 228, the defendant, being indebted to the plaintiff for coals, endorsed and delivered to him a note against one Jones, and the plaintiff gave a receipt to apply the money when paid. Jones, the maker, continued business nearly two months after the note fell due, and then became a bankrupt: and the first question made by the counsel was, whether the plaintiff, by receiving the note and not applying for the money due thereon, had lost his original debt; and the court held that he had, and gave judgment for the defendant. In *Chamberlyn v. Delarive*, 2 Wills. 353, the defendant, being indebted to the plaintiff for work and labor, gave him a draft upon one Heddy, which the plaintiff held until after Heddy became insolvent, without demanding payment; and in an action upon the original debt, the jury found a verdict for the plaintiff, on the ground that the draft upon Heddy was not a negotiable bill of exchange. It was admitted by the counsel that the defendant would have been discharged if the instrument had been a bill of exchange; but the court granted a new trial, and held the defendant discharged whether the instrument was strictly a bill of exchange or not. They said that the plaintiff, by accepting the note or draft, undertook to be duly diligent in trying to get the money of Heddy, and to apprise the defendant, the drawer, if Heddy failed in payment. See also *Ward v. Evans*, 2 Ld. Raym. 928. In *Hebden v. Hartsink*, 4 Esp. R. 46, the defendants proved that they had given the plaintiffs bills for a part of his debt, and claimed that the amount of the bills should be allowed as payment *pro tanto*. The plaintiff insisted that the defendant must show the bills paid; but Lord Kenyon said, where a party took bills in payment of a debt, he would presume the money was received, unless the contrary was shown. In *Kearslake v. Morgan*, 5 T. R. 553, the defendant pleaded that he had endorsed and delivered to the plaintiffs a note made by one Pierce, which the plaintiffs accepted and received *for and on account of their debt*; and on demurrer it was objected that the plea neither alleged that the note was received in satisfaction, nor that it had been paid, or that the plaintiffs had been guilty of laches. But the court held the plea good. Mr. Chitty, *Chit. on Bills*, 97, Phila. 1826, refers to this case, and says, such a

plea is good, and compels the plaintiff to reply that the bill or note has been dishonored.

It is, I think, settled upon authority, that the plaintiff was bound to present the bills for payment, and give notice if they were not paid, and that the burden lies on him, of proving that due diligence has been used. The rule is right in principle. The defendant had a right to presume that the bills would be presented; and if he received no notice of their dishonor, he would naturally conclude that his funds in the hands of the drawee had been applied in satisfaction of his debt to the plaintiff. And clearly it should lie on the plaintiff, who held the bills, and whose duty it was to act upon them, to show what had been done.

If, on another trial, the plaintiff can make out due diligence, or such facts as will excuse the want of presentment and notice, and the bills are produced and cancelled, he may then recover the balance of his judgment, after deducting the \$50 paid in cash. But if he fails to make out such a case, there must be a further deduction from the judgment, equal to the amount of the bills at the time they became payable.

Should it turn out that the bills were accepted and paid, other questions may arise which need not now be considered.

New trial granted.

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### OKIE v. SPENCER.

In the Supreme Court of Pennsylvania.

DECEMBER TERM, 1836.

[REPORTED 2 WHARTON, 253-261.]

IN ERROR.

*Where the holder of a promissory note, on the day that it became due accepted from the maker a check drawn upon a bank, by a firm, consisting of the maker and a third person, dated six days afterwards, which check was to be in full satisfaction of the note, in case it was paid at maturity; it was held that this amounted to a suspension of the remedy against the maker, and discharged the endorser.*

*A special plea, which sets forth the facts of an agreement, may be good on demurrer ; although the legal effect or result thereof is not averred.*

*Thus, in assumpsit on a promissory note against the endorser, the defendant pleaded specially, that the plaintiff, on the day the note became due, agreed to accept from the maker a check upon a bank, drawn by a firm, consisting of the maker and a third person, dated six days afterwards, which check was to be in full satisfaction of the note, if paid at maturity, and that the check was accordingly accepted, &c. ; it was held, that the plea was good, although it did not aver that there was an agreement to give time to the maker, &c.*

On a writ of error to the District Court for the City and County of Philadelphia, it appeared that Abraham Okie brought an action on the case in that court, against Asa Spencer, and declared in *assumpsit* on a promissory note, drawn by Oliver Spencer in favor of Asa Spencer, and by him endorsed.

The note came into the hands of one D. Williamson, and was in his hands on the day it fell due. It was afterwards endorsed by him, and came to the hands of the plaintiff.

The defendant filed three special pleas, the third of which was as follows :

“ And for a further plea, &c. ; because he says that the said promissory note was endorsed for the accommodation of the said Oliver Spencer, the drawer thereof, and that the said Asa never received any consideration whatever for the said note, nor for endorsing the same as before mentioned. And the said Asa further says, that at the maturity of the said promissory note, &c., viz., on the 3d of May, 1833, viz., at, &c., the said Oliver Spencer, the maker, &c., and one D. Williamson, who was then and there the holder, &c., agreed that the said Oliver Spencer should give, and the said D. Williamson would accept, the draft, commonly called the check, of the firm of Spencer & Marshall, which said firm was composed of the said Oliver Spencer and one Joseph H. Marshall, upon the Farmers' and Mechanics' Bank, for the full amount of the said promissory note, in the said declaration mentioned, and payable six days from the maturity of the said promissory note, viz., from the 3d of May, 1833, which said term or latitude of payment was to be effected by the device or contrivance of post-dating said check to the 6th day thereafter,

viz., the 9th day of May, 1833, and the said check was to be a full satisfaction of the said promissory note, in case the said check was duly honored at its maturity; and the said Asa doth further aver, that such check was then and there given by the said Oliver Spencer, and accepted by the said D. Williamson, in pursuance of the agreement aforesaid; and the said Asa doth further aver, that the said agreement, and the said giving and accepting of such check, were without the privity, knowledge and consent of him, the said Asa; and the said Asa doth further aver, that afterwards, to wit, at the September term, in the year 1833, of the District Court, &c., the said Abraham Okie obtained judgment on the said check, against said Oliver Spencer and Joseph H. Marshall, for the full amount thereof, &c.; and this," &c.

To this plea the plaintiff demurred generally; and the defendant joined therein.

On the 2d of July, 1836, the District Court, after argument, gave judgment on the demurrer in favor of the defendant.\*

The plaintiff then took a writ of error; and on the return of the record, assigned the following errors:

1. "The court below erred in deciding, that if the holder of a promissory note accepts from a maker a check of a third person, for the amount, on a bank, payable in six days, in satisfaction for the note, in case the check is duly honored at maturity, this amounts to a suspension of the remedy of the holder against the maker of the note, and consequently discharges the endorser, although the note had been regularly protested, and notice thereof given to the endorser.

2. The court erred in deciding, that on a general demurrer to a special plea, which sets forth a certain state of facts, but does not allege a contract in terms for a particular object—as where the plea sets forth the facts referred to in the first error assigned, but does not allege in terms that they constitute a contract to give time to the makers for the payment—the plea is not defective.

3. The court erred in deciding, that in a special plea, it is allowable to allege the facts as they really are, without alleging their legal construction or effect.

\*Miles, 299, (Okie v. Spencer.)

4. The court erred in declaring, that the third plea pleaded in the above case, in the court below, was valid, notwithstanding the demurrer.

5. The court erred in deciding, that the facts set forth in the pleadings amounted to a giving of time and a suspension of the plaintiff's right to sue the maker, whereas such giving of time was not averred in the plea, and was beyond the limit of judicial construction—and which the defendant was bound to aver in his plea.

6. The court erred in deciding that the check in question was virtually a substitute or exchange for the note; whereas it was a mere security collateral and accessorial to the note.

7. The court erred in assuming the right to decide upon the question whether time was given or not—whereas that was a question to be decided by the jury upon the evidence.

8. Because the court determined that time was given, which was a matter not averred in the defendant's plea, and which was in direct opposition to the fact that the original note as well as the check were retained by the plaintiff, and no stipulation for surrender of either was made."

Mr. *Brushars* for the plaintiff in error.

1. The acceptance of the check of a third person under the circumstances of this case, did not discharge the defendant. Unless the remedy against the drawer was suspended during the time, the endorser could not complain. *Sterling v. Marietta Co.* (11 Sergt. & Rawle, 179), *Pring v. Clark* (2 Dowl. & Ryl. 28; S. C. Eng. Com. Law Rep. 10). There were no argument here to stay proceedings. The check taken was that of a third person; mere collateral security. *Davis v. Gyde* (2 Adolph. & Ellis, 623; S. C. 29 Eng. Com. Law Rep. 169). *Chitty on Bills*, 440; *Hurd v. Little* (12 Mass. Rep. 502). *Gould v. Robson* (8 East, 576).

2. The plea did not aver that there was an agreement to stay proceedings against the drawer; which is necessary according to the books.

3. Whether time was given or not, was a question for the jury, which the court ought not to have decided. It does not follow of course that a creditor, who takes collateral security, thereby binds himself not to sue. It is a question of evidence. *Theobald on Principal and Surety*, 130.

Mr. *Law* (with whom was Mr. *F. W. Hubbell*).



This was the case of a note, endorsed for the accommodation of the maker. There is but one question, viz., whether the facts set forth in the plea, and admitted by the demurrer, are sufficient to discharge the defendant. In Chitty on Bills, 291 (8th edit.), the rule is laid down with precision, and with the proper exceptions. So by Chitty, jun., page 100, and Theobald in his Treatise on Principal and Surety, the effect of a transaction with the drawer, by which the holder places himself in such a situation as not to be able to sue the former, is laid down, and the rule is recognized in like manner by this court in Clippinger v. Creps (2 Watts, 45). In fact, there is no difficulty about the rule; the only question is, what amounts to giving time. In Hewet v. Goodrich (2 Carr. & Payne, 458; S. C. 12 Eng. Com. Law Rep. 219), C. J. Abbott says, "giving time is where the party disables himself from suing on the bill," &c. Then could the plaintiff have sued on this note during the six days? Clearly not. There was no motive or consideration for the check, unless time was to be given. Cruger v. Armstrong (3 Johns. Cases, 5). There is a class of cases which decide that a bill or note is not satisfaction of a debt. Tobey v. Barber (5 Johns. Rep. 68). Putnam v. Lewis (8 Johns. Rep. 389). Chitty, jun., on Bills, 100, note. Mildert v. Masterman (2 Campbell, 179). Rees v. Berington (2 Ves., jun., 539). Bayley on Bills, 339. Scarborough v. Norris (1 Bay's Rep. 177). Booth v. Ross (8 East, 576). Craig v. Shalcross (10 Serg & Rawle, 377). 13 Wendell, 134, 509. 1 Esp. N. P. Rep. 5. The case of Pring v. Clarkson, cited on the other side, and which is reported also in 1 Barnewall & Cresswell, 14, is distinguishable from this in several respects; but it is doubted by several writers. Chitty on Bills. Chitty, jun., on Bills, 112 (note). Bayley on Bills, 5th edition 345 (note). Hill v. Reed (1 Dowl. & Ryl. 26; S. C. 16 Eng. Com. Law Rep. 418). As to the plea; the plaintiff having demurred, had admitted all the facts and conclusions to be drawn from them.

The opinion of the court was delivered by

KENNEDY, J. The defendant here having endorsed the note in question, for the accommodation of the drawer, and therefore being regarded as a surety merely, it is admitted that if further time was given, when it fell due, by the holder to the drawer, for the payment thereof, the defendant is thereby discharged. And the only question to be decided is, whether from the facts set forth

by the defendant in his special plea, to which the plaintiff has demurred, the law will imply an agreement made on the third of May, the day the note became payable, by the holder of it, to give further time until the sixth of the same month, to the drawer for the payment thereof.

And the defendant pleaded the general issue only, and under it, as he certainly might, have given evidence of the facts set forth in his special plea, and the truth of them had been clearly established by the evidence or the admission of the plaintiff, without more having been shown to the jury, it would undoubtedly have been the duty of the court to have instructed the jury that the facts thus established, implied an agreement, on the part of the holder of the note, for an adequate consideration received by him, to give time to the drawer for the payment of it, without having the consent of the defendant; and that the latter was thereby discharged from his liability as endorser. In the absence of all proof to the contrary, it cannot be supposed here, that the drawer, when the note had become payable, could have had any other motive for giving the check of himself and his partner, securing the payment of it at the expiration of six days, than that of procuring indulgence for that space of time upon his note from the holder of it. That such, too, must have been the understanding of them both at the time, seems to be the necessary inference from the facts stated, if our judgments are to be guided in this respect by what we know to be the common and ordinary motives which generally influence and produce such arrangements. Marshall, the partner of the drawer of the note, does not appear to have been bound for the payment of it in any way before it fell due, which tends generally to strengthen, and in truth to make the inference that the check was given to procure further time for the payment of the note irresistible. And although the check cannot be considered as having been taken in satisfaction of the note; nor as having extinguished it; yet the right of the holder to proceed against the drawer to enforce the payment of it, by suit, was thereby suspended until after the expiration of the six days. It was in effect changing without the consent of the defendant, the terms upon which he had agreed as endorser to become liable for the payment of the note, and depriving him of the right to pay the note at maturity, if the drawer failed to do so, and then to sue him immediately for it, and therefore amounted to a release of him from his liability. He had guaranteed by his

endorsement, the payment of the note on the 3d of May, 1833; and it was not competent for the holder and the drawer without his concurrence, to extend his guaranty to the 9th of that month, which would clearly have been the effect of their agreement and the giving of the check, if the defendant were still to be held liable for the payment of the note. That the holder, by accepting the check, put it out of his power to proceed on the note, by suit against the drawer, until after the six days, cannot, as it appears to me, be controverted upon any ground that would seem to be consistent with the nature of the transaction, and what must have been the intent of the parties. Had the drawer given his own check merely, for the payment of the note at the expiration of the six days, there might have been some color for saying that he had not thereby precluded himself from bringing suit on it during that period; because it might then have been argued with great plausibility, if not correctly, that he had obtained by it no additional security, and consequently no adequate consideration to make a promise of indulgence binding; that by the check he acquired nothing except the personal responsibility of the drawer, which he had before by virtue of the note; and therefore had he even made an express promise of indulgence for the six days, it might have been alleged, that he would not have been bound by it for want of a sufficient consideration; but as the case is presented by the special plea and demurrer, no such argument can be advanced or presented; for by the check, the holder of the note received the additional responsibility of Marshall, as a security for the payment of it; and it would therefore seem almost impossible to imagine any other reason for giving such additional security, than that of procuring an extension of payment for the six days. It is true, that it may seem to have been but a short indulgence; but being a suspension of the right of the holder of the note, to sue the drawer upon it during that period, if operated as effectually to discharge the defendant from his liability, as if it had been six years; for in either case to hold the defendant to be still bound by his endorsement, would be making him liable upon terms, and in short, for the fulfilment of a contract, different from what he had agreed to. The time of payment mentioned in a note, is always a very material part of it; and if it may be enlarged without the consent of the endorser, and he notwithstanding be held liable upon his endorsement, there is no reason why the amount may not also be enlarged; but it is obvious, that

nothing of the kind can be done, without operating great injustice towards him; and therefore it is, if it be done, it shall release him from his liability. Every man, as long as he is a free agent, must be permitted to declare the terms upon which he is willing to incur an obligation; and having done so, it cannot be altered in any material point whatever, without his consent; nor yet anything be done which may affect his rights in relation thereto.

The counsel for the plaintiff has cited in opposition to this, the case of *Pring v. Clarkson* (1 Barn. & Cres. 14; S. C. 8 Eng. Com. L. 10), where a bill of exchange having been dishonored, the acceptor transmitted a new bill for a larger amount to the payee, without having had any communication with him respecting the first: the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards for a valuable consideration, endorsed it to the plaintiff. It was held that the second bill was merely a collateral security, and that the receipt of it by the payee, did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. Mr. Chief Justice Abbott, in pronouncing the opinion of the court, says, "in no case has it been said, that taking a collateral security from the acceptor, shall have that effect;" that is, of discharging the other parties to the bill: and concludes by saying, "here the second bill was nothing more than a collateral security." Now it is not easy to perceive why a collateral security should not have such an effect; for surely there is nothing in the nature of it which renders the giving or the taking of it inconsistent with the holder's agreeing to give time to the acceptor of a bill or the drawer of a note. On the contrary, such indulgence may be, and doubtless is in most cases, the very consideration upon which the collateral security is given and obtained; and, as I have endeavored to show, makes the case, in the absence of proof of an express agreement to give time, still stronger in favor of an implied agreement to that effect, than where there is nothing more given than a bare renewal of the promise by the acceptor of the original bill, or the drawer of the former note, to pay the amount at a future date. But Chief Justice Abbott was mistaken, when he said, "in no case had it been said, that taking a collateral security from the acceptor shall have that effect;" for in *Gould v. Robson*, (8 East, 576,) decided some fifteen years before, it was not only said, but the case itself turned upon the very point. There the holder of the bill of exchange who when it fell due, after taking part pay-

ment of the acceptor, agreed to take a new acceptance from him for the remainder, payable at a future day, but, in the meantime, the holder to keep the original bill in his hands as security; and it was held that it amounted to a giving of time, and a new credit to the acceptor, and therefore discharged the endorser. Besides, the authority of Pring and Clarkson has been doubted by the profession. Mr. Chitty in his Treatise on Bills, 442 (8th Eng. edit.), after repeating the principle laid down in it, adds, "but it is submitted that the *mere receiving further security*, payable at a future day, would in general *imply* an engagement to wait until it becomes due. See also Bayley on Bills (5th ed.), 345, note 31; and Chitty, Jr., on Bills (ed. of 1834), 100 w. a. note 1; and in *Kendrick v. Lomax* (2 C. & J. 405), it would seem to be overruled; for it was decided there, that the holder, by taking a *renewed bill*, *impliedly* agrees to give time until it becomes due, and cannot sue in the interim on the original bill.

But it has been further objected by the plaintiff's counsel, supposing it to be held that an agreement by the holder to give time to the drawer of the note, may be fairly implied from the facts set forth in the special plea, that still the court cannot make the implication, because this is making the facts therein stated, but evidence of such agreement, and therefore they ought either to have been referred to the jury under the general issue; or otherwise, the defendant, instead of setting out the facts merely in his plea, which, at most, are only evidence of the agreement to give time, ought to have set out the agreement itself, *quasi* an agreement, which is the gist of the defence. This objection, perhaps, would not be without weight, if the rules of special pleading were to be strictly regarded here; and might possibly be sustained by the force of authority. And as we are not much in the habit of special pleading, it would certainly, therefore, be well to avoid attempting to plead such matters specially, whenever, according to our practice, it may be dispensed with; but more especially in such an action as the present, wherein it is rarely, if ever done, in England; not even when special pleading was required, generally, in all cases, and attended to with the utmost strictness. To sustain this objection, it has been argued that the rule, which requires things to be pleaded according to their legal effect, applies here; and as the defendant claims that the facts set forth in his plea, amount to an agreement in law to give further time for payment, he ought, therefore, to have stated

the agreement simply ; because this is the aspect in which he wishes the matter to be considered by the court, and, therefore, he ought to have so presented it, and not in the indirect and circuitous mode of allegation which he has adopted. Under this view of the rule, it was laid down in *Stroud v. Lady Gerrard* (1 Salk. 8), which was debt on a bail-bond, that if the defendant has put in special bail, he cannot plead in terms, that he has put in such bail, but must plead *compernit ad diem* ; because, as is there said, he must plead according to the operation things have in law. This rule, however, as I apprehend, has not been regarded in this and some of the other States, with the same strictness as in England. In *Herrick v. Bennett* (8 Johns. 374), it was held, upon demurrer to the plaintiff's declaration on a promissory note, to be sufficient, that it was set out according to its terms. The note, as stated in the declaration, was without any time being mentioned therein for payment, and the court say, "it is to be presumed that the plaintiff has stated the note in his declaration, according to the terms of it, and that is sufficient. The conclusion of law is, that when no time is specified in a note, it is payable immediately." It appeared the note was not declared on according to its legal effect ; but the court having the terms of the note, or, in other words, the facts therein contained, presented by the plaintiff's declaration, and admitted by the defendant's demurrer to be true, conceived the only matter then in issue between the parties was thus reduced to a mere question of law, which they, according to the maxim, *ad questionem legis respondent juratores sed iudices*, were bound to answer, and accordingly rendered a judgment in favor of the plaintiff.

This decision of the Supreme Court of New York was followed by this court in a case decided by it at Pittsburg, some eight or ten years ago, which, I believe has not been reported. It was preferred to the decision given in the case of *Bacon v. Page* (1 Conn. Rep. 404), which was cited and shown on the agreement ; wherein the same point arose, and received a directly contrary decision, by the Supreme Court of Connecticut. This latter court say that the plaintiff should declare on a contract, according to its legal effect, and not on the evidence of the contract ; that it did not appear from the declaration that the note had become payable ; and accordingly reversed the judgment which had been rendered against the defendant below, by the default.

In the case before us, from the facts set forth in the special

plea, the conclusion of law, that the holder of the note, when it fell due, for an adequate consideration, agreed to give time to the drawer to pay it, is quite as strong and as certain, as that the law, when a note is given for the payment of money, without any time being specified therein for that purpose, makes it payable by implication, immediately. The plaintiff was bound to know the conclusion which the law would draw from the facts stated in the plea, if true; and if not true, he knew them not to be so, and therefore ought, and no doubt would, have taken issue upon them, and put the defendant on proving them before a jury. Seeing, however, that he has only denied their sufficiency in law to defeat his claim against the defendant, we must take it that they are true, as stated in the plea. No question of fact, therefore, remains to require the intervention of a jury; the matter in issue is reduced to a mere question of law, which the court is bound to decide. Considering, then, the facts as being sufficient to raise, by implication of law, a binding promise on the part of the holder of the note, at the time it became due, to give the drawer further time for the payment of it, which discharged the defendant from his liability as endorser, we affirm the judgment.

Judgment affirmed.

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Payment is the performance of a pecuniary obligation. If something else is substituted for money, it must be as the result of a new agreement which supersedes the old, or, in other words, through an accord and satisfaction. When, however, a debt is discharged by any means, it is popularly said to be paid. Negotiable instruments bear a close resemblance to money in many of their characteristics, and the satisfaction of a debt by a note or bill is commonly designated as payment. Such an instrument may be taken as so much money, or as a means of securing the amount due. In the latter case it is appropriately termed a collateral security. It does not represent or take the place of the debt, but is placed beside it in the hands of the creditor in order to make him safe. In the former case the payment may be absolute, or conditional to be in full if the instrument is paid at maturity. 1 Smith's Leading Cases, 564, 6 Am. ed.; *McIntyre v. Kennedy*, 5 Casey. 448.

The transfer of a bill or note for or in consideration of a pre-existing debt, may be a defence to the original cause of action: First, when the note is taken in satisfaction. Next, when it is taken for the debt

with an express or implied agreement that it shall be in full when paid, and the suit is brought before the instrument matures. Thirdly, when the note has been negotiated to a third person, and is still outstanding in his hands. Finally, when the creditor is guilty of laches in not presenting the instrument for payment, and giving notice of non-payment in due season as required by the commercial law, and such negligence proves injurious to the debtor. *McIntyre v. Kennedy*, 5 Casey, 448, 453; *Shipman v. Cook*, 1 Green, 251; *Kenniston v. Avery*, 16 New Hampshire, 117.

Satisfaction as distinguished from payment or performance, arises from the agreement of the parties, and not from the thing given in satisfaction, which is merely the consideration for the agreement. The accord must, therefore, be established in evidence, and will not be implied by the law. *Hart v. Baillie*, 16 S. & R. 162; *Weakly v. Bell*, 9 Watts, 280, *Phelps v. Johnson*, 8 Johnson, 58; *Gregory v. Thomas*, 2 Wend. 47; *Ghallager's Ex'rs v. Roberts*, 2 W. C. C. R. 191; *Woodward v. Miles*, 4 Foster, 289; *Downey v. Hicks*, 14 Howard, 240; *Lyman v. The United States Bank*, 12 Id. 225; 1 Smith's Leading Cases, 445, 458, 6 Am. ed.

This is peculiarly true where a promise is made to a man who is entitled to performance, and the effect of construing the transaction as an accord is to substitute one cause of action for another. *Wheeler v. Schroeder*, 4 Rhode Island, 382, 388; *Weakley v. Bell*, 9 Watts, 273, 288; *Schilling v. Durst*, 6 Wright, 128. A bill or note will not, therefore, discharge an antecedent debt unless it is shown to have been given and received as absolute payment. *Kephart v. Butcher*, 17 Iowa, 240; *Hopkins v. Boyd*, 11 Maryland, 107; *Keniston v. Avery*, 16 New Hampshire, 113; *Crary v. Bowers*, 20 California, 87; *Smith v. Owens*, 21 Id. 11; *Brown v. Cronise*, Ib. 381; *Jones v. Johnson*, 3 W. & S. 276; *Ely v. Ely*, 5 Barr, 440; *The Citizens' Bank v. Carson*, 32 Missouri, 191; 33 Id. 503.

The rule holds good, even when the new obligation is higher in degree than the old, as when a bond is given for a debt due on simple contract, unless both are so absolutely identical as to call the doctrine of merger into operation; and applies a *fortiori*, as between obligations of the same grade or nature. *Weakly v. Bell*, 9 Watts, 273, 280; 1 Smith's Leading Cases, 573, 6 Am. ed. "I agree," said Lord Holt, in *Ward v. Evans*, 2 Lord Raymond, 928, "in the difference taken by my brother Darnell, that taking a note for goods sold is a payment, because it was a part of the contract; but paper is no payment when there is an antecedent debt. For when such a note is given in payment, it is always taken to be given under this condition, to be payment if the money be paid thereon in a convenient time." And it had been previously held, in *Clark v. Mundal*, 1 Salk. 124, that a "bill should never go in discharge



of a precedent debt, except it be part of the contract, that it should be so." *Douglass v. Renolds*, 7 Peters, 113 (ante, 48); *The Kimball*, 3 Wallace, 37, 48; *Weakly v. Bell*, 9 Watts, 233, 283; *Wheeler v. Schroeder*, 4 Rhode Island, 383, 392.

It is well established, in accordance with these principles, that the burden of proof is on him who alleges that a debt has been extinguished by a bill or note. *Prima facie*, such an instrument is conditional, not absolute payment. *The Kimball*, 3 Wallace, 37; *Brown v. Scott*, 51 Pennsylvania, 357, 363; *Herring v. Sanger*, 37 Johnson's Cases, 71; *Johnson v. Weed*, 9 Johnson, 310; *Olcott v. Rathbone*, 5 Wend. 490; *Hays v. Stone*, 7 Hill, 128; *Jaffrey v. Cornish*, 10 New Hampshire, 505; *Elliott v. Sleeper*, 2 Id. 327; *Maze v. Miller*, 1 W. C. C. R. 328; *Ghallager's Ex'rs v. Roberts*, 2 Id. 191; *Harris v. Lindsay*, 4 Id. 271; *Peter v. Beverly*, 10 Peters, 532; *Schmerhorn v. Loines*, 7 Johnson, 311; *Hays v. Stine*, 7 Hill, 130; *Elwood v. Deifendorf*, 5 Barbour, 398; *Van Epps v. Dillage*, 6 Id. 244; *Vail v. Foster*, 4 Comstock, 312; *Glenn v. Smith*, 2 Gill & Johnson, 494; *Bill v. Porter*, 9 Conn. 33; *Perit v. Pitfield*, 5 Rawle, 166; *Tyson v. Pollock*, 1 Penna. R. 375; *McGinn v. Holmes*, 2 Watts, 121; *Rinsley v. Buchanan*, 5 Id. 118; *McLughan v. Rovard*, 4 Id. 308; *Costelo v. Cave*, 2 Hill's S. C. 528; *Chastum v. Johnson*, 2 Bailey, 574; *Prescott v. Hubbell*, 1 McCord, 94; *Spear v. Atkinson*, 1 Iredell, 262; *Watson v. Owens*, 1 Richardson, 111; *Gordon v. Price*, 10 Id. 385; *Weed v. Snow*, 3 McLean, 265; *Gardner v. Gorham*, 1 Douglas, 507; *Steamboat Charlotte v. Hammond*, 9 Missouri, 59; *Ayers v. Van Lien*, 2 Southard, 765; *Kelsay v. Rosborough*, 2 Richardson, 226; *Clark v. Savage*, 20 Conn. 258; *Morrison v. Welty*, 18 Maryland, 109; *McCray v. Carrington*, 35 Alabama, 698; *McMurray v. Taylor*, 30 Missouri, 263; *Blunt v. Walker*, 12 Wisconsin, 334; *The Bank of St. Mary's v. St. John*, 25 Alabama, 566, 615; *Morony v. The Mobile Ins. Co.*, 27 Id. 254.

Checks stand in this respect on the same footing with bills and notes, and will not operate as payment, unless it appears that such was the intention with which they were given and received. *The People v. Howell*, 4 Johnson, 303; *In the Matter of Brown*, 2 Story, 502; *McIntyre v. Kennedy*, 5 Casey, 448; *Strong v. King*, 35 Illinois, 9; *Johnson v. The Bank of North America*, 5 Robertson, 555, 590. In *Strong v. King*, the court, said that *prima facie*, a check was merely a means of getting paid, although entering or crediting such an instrument as cash, might be strong if not conclusive evidence, that it was received in satisfaction.

The case is not necessarily varied by the transfer of the instrument to a third person, or by discounting it in bank, and crediting the debtor with the proceeds. *Douglass v. Reynolds*, 7 Peters, 113 (ante, 48).

Under these circumstances, the cause of action is suspended in England, and there is an equitable bar under the decisions in the United States. *Matthews v. Dare*, 20 Maryland, 248. If, however, the note is dishonored, and taken up by the creditor, he will be remitted to his original position, and may sue for the debt. *Douglass v. Reynolds*; *Keene v. Dupresne*, 3 S. & R. 233; *Holaphant v. Church*, 7 Harris, 18; *Alcock v. Hopkins*, 6 Cush. 484; *Lyman v. U. S. Bank*, 12 Howard, 225; *Dickinson v. King*, 28 Vermont, 378; *Fullon v. Alhardson*, 2 A. & E. 32; *Burdick v. Green*, 15 Johnson, 247; *Hughes v. Weaver*, 8 Cowen, 77. A plea that a note had been given for the debt, and negotiated to a third person, was accordingly held insufficient in *Burdick v. Green*, because the instrument might still be re-endorsed to the plaintiff before the case was tried.

It results from what has been said, that while a negotiable instrument is a good consideration for an accord and satisfaction, the accord must be established by proof, and will not be implied from taking the bill or note. *Fickling v. Brewer*, 38 Alabama, 685; *White v. Jones*, 38 Illinois, 159; *Matthews v. Dare*, 20 Maryland, 248; *Schilling v. Durst*, 6 Wright, 126; *Smith v. Smith*, 7 Foster, 244; *Thompson v. Briggs*, 8 Id. 40; *Henbach v. Mollman*, 2 Duer, 227, 229; *McMurray v. Taylor*, 3 Missouri, 263. This is equally true whether the security given for the debt, is the note of the defendant, or of a third person. *Hayes v. Stone*, 7 Hill, 130; *Tyson v. Pollock*, 1 Pennsylvania, 376; *McIntyre v. Kennedy*, 5 Casey, 448; *Kephart v. Butcher*, 17 Iowa, 240; *Welsh v. Allington*, 23 California, 322. In the language of Ch. J. Spencer, such an instrument will not extinguish the debt, unless it is expressly agreed that it shall be payment, and the same thing was said in *Porter v. Talcott*, 1 Connecticut, 380. These dicta were cited and approved in *Peters v. Beverly*, 16 Peters, 562, 568; and in *Bayard v. Shunk*, 1 W. & S. 95; Ch. J. Gibson, said, "if the securities are transferred for a debt contracted at the time, the presumption is that they are received in satisfaction for it, but if for a precedent debt, it is that they are received as collateral security for it, and in either case the presumption may be rebutted by direct or circumstantial evidence." *Youngs v. Stahelin*, 34 New York, 258. The agreement need not however be made in express terms, but may be inferred from facts and circumstances indicating that the intention was to satisfy the antecedent obligation. *Strong v. King*, 35 Illinois, 9; *White v. Jones*, 38 Id. 159; *Harris v. Lindsey*, 4 C. C. R. 271, 276; *White v. Howard*, 1 Sandford, 811; *Benson v. Thayer*, 23 Id. 374; *Struthers v. Kendall*, 5 Wright, 214; *Hatchin v. Secor*, 8 Michigan, 494; *Robinson v. Hurlburt*, 34 Vermont, 115; *Pratt v. Foot*, 10 New York, 599. In *Hart v. Boller*, 15 S. & R. 162, Tilghman, C. J., said, "that a note will not operate as satisfaction of an antecedent debt, unless so intended and accepted by the creditor.

But if so accepted it is a satisfaction. The *quo animo*, it was accepted, is a matter of fact which the court cannot take to itself to the exclusion of the jury." (See *Douglass v. Reynolds*, 7 Peters, 113, ante 49; *Dougherty v. Hunter*, 4 P. F. Smith, 386.) "The intent may often be deduced from circumstances, though nothing positive was expressed." *Foster v. Hill*, 36 New Hampshire, 526; *Lyman v. The Bank of the United States*, 12 Howard, 244; *Johnson v. Weed*, 9 Johnson, 304; *Gardner v. Gorham*, 1 Douglass, 207. And this would seem to be the rule, when taken with the qualification, that while the jurors are entitled to draw conclusions from the evidence, the question whether there is evidence belongs to the court, and they should not be permitted to find that there was an intention to satisfy, in the absence both of direct and circumstantial proof. *Wheeler v. Schroeder*, 4 Rhode Island, 383, 392; *Bayard v. Shunk*, 92, 94; *Brown v. Scott*, P. F. Smith, 357, 363; *Mason v. Wickersham*, 4 W. & S. 100. It has indeed been said that the agreement must be express; *Noel v. Murray*, 13 New York, 168; *Crane v. McDonald*, 45 Barb. 354; *Graham v. Sykes*, 15 Louisiana, Am. ed. 49; but this would seem to mean that unless the intention to satisfy the debt appears from the acts or declarations of the parties, it will not be implied. *Robinson v. Hurlburt*, 34 Vermont, 115; *Harris v. Lindsey*, 4 W. C. C. R. 271, 276.

These decisions result from the well established principle, that an unexecuted accord will not extinguish an antecedent obligation, unless it is distinctly so agreed. In the absence of proof, the natural inference is, that a promise to perform is not satisfaction unless it is fulfilled. This presumption cannot be overcome without showing that the parties intended the debt to be extinguished, whether the promise was or was not performed. In other words it must appear that the promise merely as such was given and received in satisfaction. *Good v. Cheeseman*, B. & Ad. 328; *Evans v. Powis*, 1 Exchequer, 601; *Flockton v. Hall*, 14 Q. & B. 380; 1 Smith's Leading Cases, 444, 447, 462, 6 Am. ed.; *Lovelace v. Cocket*, Hobart, 68; *Norwood v. Grype*, Cro. Eliz. 727.

The rule was accurately stated by Bell, J., in *Woodward v. Miles*, 4 Foster, 289. "The principal question in this case is, whether the new agreement between the parties, that the defendant should pay, and the plaintiff should receive the two thousand feet of clapboards in payment of the three items of the account now in suit, discharged that account. Such an agreement can only operate to discharge the original cause of action, as an accord and satisfaction. The general rule laid down in the books is, that there must be not only an accord, but a satisfaction. An accord not executed is no bar to the original claim. *Coit v. Huston*, 3 Johns. Ca. 243; *Watkinson v. Inglesby*, 5 Johns. 386; *Russell v. Lytte*, 6 Wend. 390; *Bank v. Degraw*, 23 Wend. 342; *Peytoe's Case*, 9

Co. 79; *Walker v. Seaborn*, 1 Taunt. 526; *Fitch v. Sutton*, 5 East, 280; *Tuckerman v. Newhall*, 17 Mass. 581; 1 Com. Dig., Accord, B, 4.

"If the agreement in this case had been executed by the delivery and acceptance of the clapboards, it would have been a bar to this action; but so long as the new agreement is unexecuted, the original contract remains in force.

"An agreement to make a new contract, and that the new contract shall be accepted in satisfaction of the original one, if carried into effect, is an accord executed, and discharges the original cause of action, whether the new contract is ever performed or not. *Watkinson v. Inglesley*, before cited; *Eaton v. Lincoln*, 13 Mass. 424; *Seaman v. Hoskins*, 2 Johns. Ca. 195; *Heaton v. Angier*, 7 N. H. Rep. 397.

"But there is no presumption of law, where parties make a new contract that the creditor shall receive his pay at a different time, or place, or in a different way from that originally stipulated, that the parties agree to accept the new contract in discharge of the old. The party who alleges such agreement for the discharge of the old debt is bound to prove a distinct agreement to that effect. This question has most frequently arisen in cases where promissory notes or acceptances have been given for antecedent debts. And it is clear, that at common law the acceptance of a note or bill for the amount of a debt, is no discharge of that debt, unless it is so expressly agreed. *Wright v. Crockery Co.*, 1 N. H. Rep. 281; *Elliot v. Sleeper*, 2 N. H. Rep. 527; *Jeffrey v. Cornish*, 10 N. H. Rep. 505, where the cases are collected; *Tobey v. Barber*, 5 Johns. 68; *Johnson v. Weed*, 9 Johns. 310; *Bill v. Porter*, 9 Conn. 23; *Porter v. Talcott*, 1 Cow. 359; *Hayes v. Stone*, 7 Hill, 128. In some of the States it is held otherwise.

"In the present case it was not contended, that there was any distinct evidence tending to show that the parties agreed that the new contract should be accepted in satisfaction and discharge of the old contract. If such evidence had been deemed by the defendant to exist, he might have requested the verdict of the jury upon that point, and the question would, of course, have been submitted to them. *Willard v. Germar*, 1 Sand. S. C. 50; *Bremer v. Herr*, 8 Barr, 106. Instead of this, the court was desired to rule upon the question as a matter of law, and the decision was in accordance with the decisions of this court.

"It is suggested, that part payment of the clapboards having been made, the plaintiff could not recover upon his original account; but we are unable to see how this can affect the question. An accord must be *entirely* executed to be a defence, and if the new contract was itself accepted in discharge, it is immaterial whether it was executed or not."

The weight of authority is in accordance with this decision, that while the acceptance of goods, chattels, or other tangible property in payment, will operate as actual payment or satisfaction, a different inter-

pretation will be put on the same language when used with reference to bonds, bills, notes, or other securities which have no intrinsic value, and may be worthless if the obligor proves insolvent. *Archer v. Leh*, 5 Hill, 200; *Leas v. James*, 10 S. & R. 307, 315. In *Leas v. James*, where the question arose out of the assignment of a bond by a debtor to a creditor, and a credit given for it by the latter; Tilghman, C. J., said: "If the defendants set up the assignment of the bond as a payment, it is incumbent on them to prove that it was so intended. The writing itself shows no such thing, and in cases where a chose in action is assigned by the debtor to the creditor, I think the presumption is, that it was not intended as an absolute payment, unless it is so expressed. The reason of this presumption is, that such assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another. If these means fail, therefore, without the fault of the creditor, there is no reason why the original debtor should be discharged." So in *Archer v. Leh*, 5 Hill, 200, 204, the assignment of one demand in payment of another, on the faith of a promise that the assignor should be credited with the amount of the former, was held not to discharge the latter, because the language of the parties was equivocal, and the law would not presume that they meant absolute payment, in the absence of sufficient proof to the contrary. "The agreement," said Cowen, J., "leaves it equal, whether the credit was not to be the usual conditional one, to become absolute on the assigned claim proving available. Such is the legal construction of an arrangement to take a claim against a third person, to be applied upon a precedent debt; and the law will not hold it to be an absolute payment, unless there be an express agreement to take it as, *per se*, a satisfaction. In the absence of such an agreement, the law will not compel the creditor to apply it in discharge, till the money be actually received. Here are no such words as absolute payment, absolute satisfaction, absolute discharge, or the like, to indicate that the credit was to differ from the one usual in such cases. Even the transfer of a negotiable note against a third person, would not have been a satisfaction on the terms here used."

The better opinion seems to be that, even when the receipt or other memorandum of the transaction speaks of settlement or payment, or even of payment in full, it should be interpreted as meaning conditional payment to be in full if paid. *Schilling v. Durst*, 6 Wright, 126; *Glenn v. Smith*, 2 Gill & Johnson, 494; *Putnam v. Lewis*, 8 Johnson, 389; *Tobey v. Barber* (ante, 245); *McIntyre v. Kennedy*, 5 Casey, 448, 453; *Shaw v. The Church*, 3 Wright, 226; *Berry v. Griffin*, 10 Maryland, 27; *Wheeler v. Schroeder*, 4 Rhode Island, 383, 389; *Schut v. Hall*, 3 Williams, 165; *Schemerhorn v. Loines*, 7 Johnson, 311; *Johnson v. Cleaves*, 15 New Hampshire, 332; *Muldon v. Whitlock*, 1 Cowen, 290;

*Sutton v. The Albatross*, 2 Wallace, Jr. 327; *Jones v. Shaw*, 4 W. & S. 263; *Bradford v. Fox*, 38 New York, 289; *Buswell v. Poquer*, 37 Id. 312; *Henbach v. Mollman*, 2 Duer, 227, 259.

In *Higbee v. The Railroad*, 3 Bosworth, 487, taking part of the debt in money, the note of a third person at thirty days for the residue, and giving a receipt for the whole as cash, was said not to be satisfaction, or preclude a recovery of the original demand. And where the receipt was that a note had been taken in settlement of the account, the court said that the account was not settled by the note. *McMurray v. Taylor*, 30 Missouri, 263; *Wheeler v. Schroeder*, 4 Rhode Island, 383.

A receipt in full is, however, evidence from which it may fairly be inferred that the debt is extinguished, although the question is still one of fact, depending on the intention of the parties as disclosed by all the evidence. *Schilling v. Durst*, 6 Wright, 126; *Jones v. Shanhan*, 4 Watts & Serg. 263; *Seltzer v. Coleman*, 8 Casey, 493.

The parties may remove all doubt by saying, unequivocally, on the one hand, that the note is received conditionally to be in full when paid, or, on the other hand, that it is taken in satisfaction and discharge of the debt. Under these circumstances the intention is no longer doubtful, and the question may be decided as one of law. *Herring v. Sanger*, 3 Johnson's Cases, 71; *Harris v. Lindsay*, 4 W. C. C. R. 98, 271, 276. When this precaution is not observed, conjecture must, from the nature of the case, be substituted to a greater or less extent, for proof.

The burden of proof is, however, on the party who has the affirmative of the issue that the debt is satisfied, and to justify a decision in his favor, there must be something more than the transfer and acceptance of the note. *Matthews v. Dare*, 20 Maryland, 248; *Welch v. Alington*, 23 California, 322; *Bayard v. Shunk*, 1 Watts & Serg. 92; *Davis v. Desauque*, 5 Wharton, 530, 538; *Tams v. Hiltner*, 9 Barr, 441, 443, 448; *McMurray v. Taylor*, 40 Missouri, 463; *Fickling v. Brewer*, 38 Alabama, 685; *Crane v. McDonald*, 45 Barb. 354; *Derlin v. Chamblin*, 6 Minnesota, 468. A mere scintilla of evidence should not be left to the jury; and this standing by itself is not even a scintilla. *Mason v. Wickersham*, 4 W. & S. 100. We agree, said Washington, J., in *Harris v. Lindsay*, 4 W. C. C. R. 271, 276, "that a note or bill of exchange given for a pre-existing simple contract debt does not extinguish, and that, *per se*, it affords no grounds for presuming an agreement between the parties that it should be received in satisfaction of such debt." The dicta in *Bayard v. Shunk*, and *McIntyre v. Kennedy*, 5 Casey, 448, 451, are to the same effect; and in *Tams v. Hiltner*, Coulter, J., observed, that if the notes were not taken as collateral security but in payment and satisfaction, it was the duty of the defendant to show it. The burthen of proof lay on him and not on the creditor. "Taking a new note," said Kennedy, J., in *Weekly v. Bell*, 9 Watts, 283, "for

the same debt mentioned in the old, without an agreement to give time to the maker, to deliver up the old note to him, or that the new shall be taken in satisfaction for the old note, has ever been considered a mere collateral security, which does not affect or vary the rights or liabilities of the parties in any respect whatever." It follows that where such an agreement is not proved by those who rely upon it, it should be deemed not to exist, and the verdict found or judgment rendered accordingly. *Wheeler v. Schroeder*; *Berry v. Griffin*; *Glenn v. Smith*, 2 Gill, 494. This rule is peculiarly applicable when the note of one of several partners or joint debtors is given for a debt due by all, because the new obligation is *prima facie* less beneficial than the old. *Tums v. Hitner*; *Mason v. Wickersham*, 4 W. & S. 100; *Bowers v. Still*, 13 Wright, 65; *Shellinberger v. Seldridge*, Ib. 83; and if the accord is not express, it should at least appear that the instruments evidencing or securing the prior demand were surrendered, or the debt itself in some way unequivocally discharged. *Davis v. Desauque*; *Weakly v. Bell*, 9 Watts, 282.

Such transactions are, however, so various that no invariable rule can be laid down, and a comparatively slight circumstance may turn the scale. When the securities held by the creditor are surrendered or the note is taken as one of several items, making up a larger sum, and a receipt or credit given for the whole in full, the inference will be strong, if not irresistible, that the debt is satisfied. *Mosely v. Floyd*, 31 Georgia, 564; *Seltzer v. Colman*, 5 Casey, 493; *Frisbie v. Larned*, 21 Wend. 380. So, where a debtor offered to pay in cash, at the end of a few days, or to give the note of a third person at once, and the creditor chose the latter, he was held to have elected to take the note as money, and forego the right to enforce the debt itself. *St. John v. Purdy*, 1 Sandford, 9. And where one partner gave a note, after the partnership had been dissolved, in which the amount due by the firm was consolidated with debts arising from other intermediate transactions, and the creditor agreed to pass the note when paid, to his credit; the transaction was said to evince an intention to substitute him as the sole debtor, and discharge the original joint liability. *Harris v. Lindsey*, 4 W. C. C. R. 98, 271, 274.

In *Frisbie v. Larned*, 21 Wend. 450; the following case was stated for the opinion of the court: Frisbie and McKinney were partners. McKinney assumed the debts of the firm, and gave a small sum in cash and the note of a third person for a larger sum to one of the creditors. The latter entered the whole on his books to the credit of the partnership. He subsequently advanced money to McKinney, and took a bond and warrant of attorney for it, and for the amount of the note, which had been dishonored. Judgment was then entered on the bond. These circumstances were held to show that the joint debt was

satisfied. Cowen, J., said, "Williams' note endorsed by McKinney was received as payment. This is evident, from its being credited on the books, with the small sum of money paid at the same time, and the balance struck by the book. *Prima facie* here was an accord and satisfaction. *The New York State Bank v. Fletcher*, 5 Wend. 85; *Booth v. Smith*, 3 Id. 66. The reason why, in *Smith v. Rogers*, 17 Johns' R. 340, the new note was not allowed as payment in a case much like this, was, because the receipt for the note declared that when paid, it was to be credited. In the case at bar, it was absolutely credited at the time."

The rule *in modum solventis* applies in this as in most other instances where the condition prescribed is not invalid; and the creditor cannot by dissenting render that a collateral, which is tendered absolutely. If he takes the note, he must take it subject to the conditions prescribed by the debtor. *Burlington Co. v. Greene*, 22 Iowa, 508; see *McDaniel v. Lapham*, 21 Vermont, 222; *McDaniel v. The Bank of Rutland*, 3 Williams, 230; *Croft v. Lumley*, 1 Ellis, Bl. & Ellis, 1069, 1081.

It is established, that when the note, acceptance, or endorsement of a third person is taken in satisfaction, the debt is extinguished, and will not revive on the dishonor of the note; *Heidenheimer v. Lyon*, 3 E. D. Smith, 54; *Gallagher v. Ketchum*, Ib. 175; *Shipman v. Cook*, 1 Greene, 251; *Boyd v. Smith*, 3 Wend. 66; *The New York Bank v. Fletcher*, 5 Id. 66; *Radlett v. Heren*, 20 New Hampshire, 102; *Boyd v. Hitchcock*, 20 Johnson, 76; *LePage v. McCrea*, 1 Wend. 164; *The Union Bank v. Snooks*, 1 Sneed, 401; but there is room for doubt where the new security only bears the name of the party by whom it is relied on as a defence. It was considered at one period, that the note of the debtor could not extinguish the debt. Such an instrument was said to be a mere promise to pay, and therefore no equivalent for the surrender of the antecedent right of suit. *Frisbie v. Larned*, 21 Wend. 450, 452; *Cumber v. Wain*, 1 Strange, 426; *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Licer*, 5 Id. 448. In *Cumber v. Wain*, the note was for a less sum than the debt, but the decision would apparently have been the same if it had been given for the full amount. Pratt, Ch. J., said, that one bond would not satisfy another, even when it bettered the position of the obligee. When, however, the question arose in *Sard v. Rhodes*, 1 M. & W. 152, which was a suit against an acceptor for £43, the court sustained a plea, that after the bill became due, the drawer made his promissory note for £44, and delivered the same to the plaintiff in full satisfaction and discharge of the bill. In the subsequent case of *Sibree v. Tripp*, 15 M. & W. 22, Pollock, C. B., said, that it was established under *Sard v. Rhodes*, that the acceptance of a negotiable security might be pleaded as a satisfaction of a simple contract for a like amount, and the only question was whether the doc-



trine applied when the claim was for a larger sum. On this point the court were of opinion with the defendant. A debt might be satisfied by giving a different thing, not part of the sum itself but having different properties. The weight of authority is in accordance with this doctrine, that the note or acceptance of a debtor will, if it is so agreed, extinguish the obligation of the debt. *Keogh v. McNitt*, 6 Minnesota, 313; *Myers v. Welles*, 5 Hill, 463; *Sard v. Rhodes*, 1 M. & W. 153; *Sibree v. Tripp*, 15 Id. 22; *Sheehy v. Mandeville*, 6 Cranch, 253; *Hart v. Boller*, 15 S. & R. 175; *Jones v. Shawhan*, 4 W. & S. 257; *Glenn v. Smith*; *Ligon v. Dunn*, 6 Iredell, 138; *Mims v. McDowell*, Geo. 182; *Dogan v. Ashley*, 1 Richardson, 36; *Bonnell v. Chamberlin*, 21 Conn. 487; *Wetherley v. Mann*, 11 Johnson, 518; *Arnold v. Camp*, 12 Id. 409.

In New York, however, the courts hold to the ancient rule, that the note of a debtor, or of two or more joint debtors cannot operate as satisfaction, because the parties are the same and the change in the cause of action merely one of form. If this were strictly accurate, the agreement would be unanswerable. It is, however, obvious that such an instrument may be more advantageous in many ways than the naked demand for which it was received, and will even, if not negotiable, enable the holder to recover on proving the signature of the maker without adducing evidence to show the existence of a consideration.

"A promissory note," said Parke, Baron, in *Baker v. Walker*, "though not a specialty, resembles a specialty, and is at all events a security." A naked promise to do that to which the party is already bound cannot be a satisfaction, because the inadequacy appears on inspection by a necessary legal inference. A promise to do a different thing is *prima facie*, a mere accord which unexecuted does not bar. *Schilling v. Durst*, 6 Wright, 128. But such a promise may be a satisfaction if so intended; and so may a higher security for the performance of the original obligation. 1 Smith's Leading Cases, 573, 6 Am. ed. A promissory note is confessedly an adequate consideration for an agreement to suspend the debt. This is conceded even in New York; *Myers v. Wells*, 5 Hill, 463; where the courts adhere with a curious inconsistency to the doctrine of *Cumber v. Wain*, when the agreement is by way of accord and satisfaction. *Frisbie v. Larned*, 21 Wend. 350; *Cole v. Sacket*, 2 Hill, 516; *Wagdell v. Luer*, 5 Hill, 448. It is established in that State, under these decisions, that a note of the debtor, or of two or more joint debtors, will not satisfy the debt even when it is expressly so agreed.

All the authorities concur that a naked promise by a debtor not put in the form of a promissory note, will not satisfy the debt. But it is now established that the promise of one of several partners, or co-

contractors, is a sufficient consideration for an agreement to look solely to him, and discharge the rest. *Powell v. Charless*, 34 Missouri, 485; *Livingston v. Radcliff*, 6 Barb. 202; *Van Epps v. Dillaye*, Ib. 245; *Lyth v. Ault*, 7 Excheq. 669; *Very v. Levy*, 13 Howard, 435; *Kreussler v. Pope*, 5 Strobbart, 126. This is true even when the promise is merely oral, and applies *a fortiori* when the agreement is reduced to writing or the note of one of the members of a firm is taken in satisfaction of a partnership debt. *Powell v. Charless*; *Robinson v. Hurlburt*, 34 Vermont, 115; *Harris v. Lindsay*, 4 W. C. C. R. 98, 271; *Sheehy v. Mundeville*, 6 Cranch, 253; *Bonnell v. Chamberlain*, 26 Conn. 487; *Stephens v. Thompson*, 2 Williams, 77; *Thompson v. Percival*, 5 B. & Ad. 924; *Waydell v. Leur*, 3 Denio, 510; *Arnold v. Camp*, 12 Johnson, 409; *Sard v. Rhodes*, 1 M. & W. 152.

The question is, however, one of fact for the jury, depending on the intention with which the instrument was given and received, and such an intention will not be inferred from the mere acceptance of the note. *Powell v. Charless*; *Rayburn v. Day*, 27 Illinois, 46; *Harris v. Lindsay*, 4 W. C. C. R. 271, 274; *Bedford v. Deakins*, 2 B. & Ald. 210.

In *Arnold v. Camp*, 12 Johnson, 409, the inference of satisfaction was deduced from the surrender of the partnership note, but when the instrument which was alleged to have extinguished the joint liability, was to be credited to the firm when paid, the court held that the payment was conditional and did not extinguish the antecedent obligation.

In Massachusetts, Maine and Vermont, taking the note or bill of the debtor or of a third person for an antecedent debt, is *prima facie* satisfaction, and precludes the creditor from enforcing the original demand whether the new security is or is not honored. *Thacher v. Dinsmore*, 5 Mass. 299; *Johnson v. Johnson*, 11 Id. 230; *French v. Price*, 24 Id. 13; *Hutchins v. Olcott*, 4 Vermont, 549; *Torrey v. Baxter*, 13 Id. 452; *Farr v. Stevens*, 26 Id. 299; *Wait v. Brewster*, 31 Id. 516; *House v. Alexander*, 2 Metcalf, 157; *Homes v. Smith*, 16 Maine, 177; *Wise v. Hilton*, 4 Id. 435; *Fowler v. Ludwig*, 34 Id. 455. In the absence of direct and circumstantial proof, the inference is that the debt is paid. *Robinson v. Hurlburt*. But this presumption may be rebutted by showing that such was not the intention of the parties; *Bonnell v. Chamberlain*, 26 Conn. 488; *Robinson v. Hurlburt*, 34 Vermont, 115; *Dickinson v. King*, 28 Id. 378; *Callamore v. Langdon*, 3 Id. 32; *Ward v. Howe*, 38 New Hampshire, 35; *Butts v. Dean*, 2 Metcalf, 76; *Curtis v. Hubbard*, 9 Id. 322; *Gilmore v. Bussy*, 12 Id. 418; *Kendall v. Knox*, 38 Maine, 551; *Page v. Hubberd*, Sprague, 335; *Comstock v. Smith*, 22 Maine, 262; *Follett v. Steele*, 16 Vermont, 30; *Mellidge v. Boston Iron Co.*, 5 Cushing, 158; and will not arise where the extinguishment of the debt would deprive the creditor of a higher security, or

substitute a merely personal obligation for a lien. *The Kimball*, 3 Wallace, 37, 46.

The recent cases tend to correct this anomaly, which seems to have originated from confounding conditional with absolute payment, by reverting to the doctrine of the common law that a note or bill is not satisfaction unless it is so agreed; *Brewster v. Wait*; *Ward v. Howe*, which prevails in New Hampshire and Rhode Island; *Wheeler v. Schroeder*, 4 Rhode Island, 382; *Wright v. The Maine Crockery Ware Co.*, 1 New Hampshire, 280; *Thompson v. Briggs*, 8 Foster, 40; *Randle v. Herrin*, 20 Id. 102; and seemingly in Connecticut; *Davidson v. Bridgeport*, 8 Conn. 72; although in *Chamberlain v. Bonnell*, 26 Conn. 488, the court appear to have thought that the debt is *prima facie* extinguished.

In the absence of an agreement to satisfy the debt, a bill or note may be taken as conditional payment, "to be in full when paid." Under these circumstances, the original cause of action is suspended from the nature of the case, until the new security matures and is dishonored; Byles on Bills, 6 ed. 304; or to state the rule more accurately, such a payment is subject to this condition, that if the instrument be not paid when due the debt will revive, and may be recovered unless the creditor has been guilty of laches to the prejudice of the debtor (ante, 249). *Belshaw v. Bush*, 11 C. B. 191; *The Phoenix Ins. Co. v. Allen*, 11 Michigan, 507; *Smith v. Owens*, 21 California, 11; *Brown v. Cronise*, Ib. 386; *Higgins v. Worth*, 18 Id. 330; *Griffith v. Gray*, 12 Id. 317; *Noel v. Murray*, 2 Kernan, 167. The law is clear, said Lord Kenyon, in *Stedman v. Gooch*, 1 Esp. 4, that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action for his original debt, until such bill or note becomes payable and default is made in the payment. *Price v. Price*, 16 M. & W. 231, 239. The rule is established on this basis under the authorities; *Kearslake v. Morgan*, 5 Term, 513; *Gould v. Robson*, 8 East, 596; *Simon v. Lloyd*, 2 Cr. M. & R. 187; *Kendrick v. Lomax*, 2 Tyrerwhitt, 438; *Mercer v. Cheese*, 4 M. & G. 804; *Maillard v. The Duke of Argyle*, 6 Id. 40; *Weakly v. Bell*, 9 Watts, 273; *Holms v. DeCamp*, 1 Johns. 34; *Putnam v. Lewis*, 5 Id. 389; *Burdick v. Given*, 15 Id. 247; *Humphries v. Wheeler*, 8 Cowen, 77; *Myers v. Welles*, 5 Hill, 463; *Glenn v. Smith*, 2 Gill & Johns. 449; *Belshaw v. Bush*, 11 C. R. 191; *Wheeler v. Schroeder*, 4 Rhode Island, 383, 386; *The Michigan State Bank v. Leavenworth*, 2 Williams, 209; *Bangs v. Mosher*, 23 Barb.; which also show that where the new or substituted security is negotiable, it must be produced and surrendered before the plaintiff can proceed to judgment. A plea that it is outstanding in the hands of a third person, is consequently a good defence. *Matthews v. Dare*, 20 Md. 248; *Morrison v. Wilby*, 18 Id. 369; *Rey-*

*burn v. Day*, 27 Ills. 46; *Hays v. McClurg*, 4 Watts, 452; and the rule applies in England where it has been lost. *Crowe v. Clay*, 9 Excheq. 604, 608.

It is, however, not less true in this case than where the instrument is taken absolutely, that a note or bill is not payment of a pecuniary obligation, unless the parties so agree. *Shaw v. The Church*, 3 Wright, 226; *Weakly v. Bell*, 9 Watts, 273. In the absence of such an agreement, a new security for an antecedent debt is an additional or collateral security, and not payment. When such a defence is brought to the test of pleading, the material allegation is, that the note was taken for and on account of the debt. *Price v. Price*, 16 M. & W. 231. This averment is traversable, and if it be found for the plaintiff, the defence will fail.

In this way only, can the cases which teach that taking a note or bill payable at a future day for an antecedent debt suspends the right of suit; *Kendrick v. Lomax*, 2 C. & J. 405; *Gould v. Robson*, 8 East, 576; *Walton v. Wascall*, 13 M. & W. 452; *Baker v. Walker*, 14 Id. 465; *Price v. Price*, 16 Id. 232; *Myers v. Welles*, 5 Hill, 465; *Fellows v. Prentiss*, 3 Denio, 518; *Mercer v. Lancaster*, 5 Barr, 160; *Okie v. Spencer*, 2 Wharton, 259 (ante, 253); be reconciled with those which treat the question as one of fact, depending on the intention of the parties as disclosed by the evidence. *Pring v. Clarkson*, 2 B. & C. 14; *Weakly v. Bell*, 9 Watts, 273; *Shaw v. The Church*, 3 Wright, 226.

The preliminary inquiry, whether the note was given for the debt, or as a collateral security, belongs to the jury, and if they are of opinion that the new security is merely collateral, the debt will not be suspended. This is all that the case of *Weakly v. Bell* necessarily determines, although we may doubt whether the principle was correctly applied to the evidence. When, however, the question arose in *Shaw v. The Church*, the court seem to have thought that if the instrument is not taken in satisfaction it will be a collateral security. There is, however, another alternative, that of conditional payment, which had been distinctly recognized in *Kennedy v. Childs*, 5 Casey, 448, and is one of the established heads of the commercial law. 1 Smith's Leading Cases, 564, 6 Am. ed. Where the creditor gives a receipt in full on receiving a note or bill, the debt is manifestly paid, and the question whether the payment is absolute or conditional is the only one that can be raised consistently with the language in which the parties have expressed their intention. *Fellows v. Prentiss*, 3 Denio, 512. The presumption is nearly, if not quite as strong, where a settlement is had and a note given for the balance. *Myers v. Welles*, 5 Hill, 443. And it may be said in general, that when it is made to appear by any sufficient means of proof, that a note has been given for and on account of a pre-existing debt, and so received, the law will imply an agreement not

to sue until the maturity of the note. *Okie v. Spencer* (ante, 220, 253); *Walton v. Mascall*, 13 M. & W. 452. In *Walton v. Mascall*, a declaration averring that the defendant had guaranteed a promissory note, in consideration that the defendant would accept it for and on account of a debt due by the makers, and thereby give them time for the payment of the debt, was held to disclose a sufficient consideration to sustain the guaranty. "The declaration," said Pollock, C. B., "shows not merely that the plaintiff did give time by receiving the note, but that he took it under circumstances which compelled him to give time. The case of *Kearslake v. Morgan*, 5 T. R. 513, establishes that a creditor who receives a negotiable instrument for and on account of his debt, is taken to have received it in present satisfaction, and the receipt of it operates as a suspension of the remedy upon the debt."

In like manner where a judgment creditor took the note of the debtor payable at a future day, there was held to be an implied consideration in the shape of an agreement not to enforce the judgment until the note fell due. *Baker v. Walker*, 14 M. & W. 465. "When a man," said Parke, Baron, "who has a judgment debt, takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, this is a good consideration for giving the note." The same doctrine was laid down in *Belshaw v. Bush*, 11 C. B. 191, 200; and in *Ford v. Buck*, 11 Q. B. 852, 873, it was said to depend on the peculiar nature of negotiable instruments, and to be a necessary exception to the general rule of law in favor of the law merchant. These decisions are conclusive of the English rule, and the authorities in the United States point in the same direction. In *Myers v. Wells*, 5 Hill, 463, which was an action on a guaranty, the principal debtor had given his notes at two, three, and four months, for the amount due on a settlement of accounts between him and the creditor. The courts said that the notes liquidated the claim, and being negotiable might be used more beneficially than the account. These advantages were a sufficient consideration for the suspension of the debt. The intention to extend the time of payment was undeniable; and as the assent of the guarantor had not been obtained he was discharged. The subsequent case of *Fellows v. Prentiss*, 3 Denio, 512, was also a suit against a guarantor. It appeared from the evidence, that the plaintiff had taken the notes of the principal debtor at sixty and ninety days, and one day after date, and given a receipt acknowledging that the debt was paid. The Chancellor said that the receipt and the notes showed that the notes were received in payment, and it made no difference that one of the notes was payable on the succeeding day. The evidence which had been offered to show contrary to the writing that this instrument was a mere memorandum,

which did not extend the credit, was inadmissible. It clearly suspended the debt *pro tanto* for four days, including the days of grace. If the creditor gave time by a binding agreement although but for a single day, the surety would be as effectually discharged as if a new cause of action had been substituted for the original demand. The liability of the defendant under the guaranty was therefore at an end.

In *Okie v. Spencer*, the question arose in a suit against the endorser of a promissory note. The defendant pleaded that the maker of the note gave and the plaintiff accepted a check payable at a future day, which was to be in full satisfaction of the note, if the check was duly honored. The court held, on a demurrer to the plea, that there was an implied agreement on the part of the holder to give time to the maker, which exonerated the endorser.

The principle was applied conversely in *Mercer v. Lancaster*, 5 Barr, 160, to uphold a recovery against the endorser of a promissory note. The defence was want of consideration. It was shown at the trial, that the note had been given to a surety by the principal debtor as a counter security. The court held that the effect of the transaction, was to preclude the surety from enforcing his equitable right to compel the payment of the debt when due. There was consequently a sufficient consideration for the endorsement. These decisions may be overruled in Pennsylvania by the case of *Shaw v. The Church*, but they accord with the rule of the commercial law as established in England, and generally in the United States. *Okie v. Spencer*, 2 Wharton, 253 (ante); *The Michigan State Bank v. Leavenworth*, 2 Williams, 20; *Bangs v. Mosher*, 23 Barb. 478; *The Phoenix Insurance Company v. Allen*, 501, 509; *Wheeler v. Schroeder*, 4 Rhode Island, 383. The presumption is, however, merely *prima facie*, and may be repelled by direct or circumstantial proof, that such was not the intention of the parties. *Wyke v. Rogers*, 12 Eng. Law & Equity, 162. In *Weakly v. Bell*, 9 Watts, 273, the persons who witnessed the transaction, testified that the creditor took the note as a collateral security, and the question was properly left as one of fact to the jury. So in *Ghan v. Niemewicz*, 3 Paige, 11 Wend. 372, the answer of the defendant, denying an agreement to give time, was allowed to control the inference that the debt had been suspended. .

When such a defence is made in pleading, there should be such a reasonable certainty of allegation, as will present the material question whether the instrument was given as security or payment definitely, and enable the jury to determine it by their verdict. An averment that the note was taken for and on account of the debt, is sufficient for this purpose, and if it be admitted by a demurrer or found for the defendant, the law will draw the inference that the instrument was taken conditionally to be in full if paid. *Kearslake v. Morgan*, 5 Term, 513;

*Price v. Price*, 16 M. & W. 232; *Okie v. Spencer*, 2 Wharton, 253 (ante). An allegation that the maker of the promissory note sued on and one Marshall gave, and the holder of said note accepted their draft at six days for the amount of the note, which said draft if duly honored, was to be a full satisfaction of the same, was in like manner held sufficient in *Okie v. Spencer*. It appeared distinctly in this instance that the minds of both parties met in the new or substituted agreement, but an averment that the note was received for and on account of the debt, will, it seems, be sufficient, because it could not be so received unless it was so given. See *Webb v. Weatherly*, 1 Bing. N. C. 502; *Crisp v. Griffith*, 2 Cr. M. & R. 159.

If the plaintiff, in *Okie v. Spencer*, had joined issue and gone to trial, it would have been competent for him to show that the transaction set forth in the plea was a purchase, subject to the right of the endorser to take up the note and proceed forthwith against the maker. If this had been established the defence must have failed. The assignment of a demand, or chose in action, does not vary the antecedent relations of the parties, nor will it discharge a surety or endorser. And the mere circumstance that the name of the maker or obligor appears on the security given by the assignee, is not conclusive that the debt was paid or satisfied, and not sold.

A conditional payment is, for the time being, so far absolute, that it will entitle a purchaser to possession, and preclude the vendor from relying on his lien for the price. *Miles v. Gorton*, 2 Cr. M. & R. 504, 512. The dishonor of the instrument will, however, revive the lien and justify the retention of the goods, notwithstanding a partial delivery during the interval.

The doctrine applies when a note or bill is given by a third person on behalf of the debtor, and the payment is subsequently ratified by him. *Belshaw v. Bush*, 11 C. B. 191, 206; see *Littleton v. Thompson*, 2 Beasely, 274; *Carter v. Black*, 4 Dev. & Bat. 425. In *Belshaw v. Bush*, the defendant pleaded that after the cause of action accrued, the plaintiff drew a bill for £33 10s. parcel of the debt, on Wm. Bush, the father of the defendant, and that the said Wm. Bush accepted the said bill and delivered the same to the plaintiff for and on account of so much of the debt, and that the defendant afterwards endorsed and delivered the said bill to one Patrick Gray, who became, and was at the commencement of the suit, the holder of the bill, and entitled to enforce the same against the acceptor. The court said that if the bill had been given by the defendant, it would have operated as a conditional payment having the same force as an absolute payment, unless the condition on which it was defeasible took effect, and there was no reason why a bill given by a stranger should not be a conditional payment by him. The case, therefore, was the same as if Wm. Bush had

paid the debt for, and on behalf of the defendant. It was clear, on the authority of Coke Littleton, 206, b., that if a stranger gave money in absolute or conditional payment, on behalf of another, and the act was adopted by him, it would operate as a payment by himself. So in the case of 36 Henry VI., reported in Fitzherbert's Abridgment, title Barre, pl. 166, "if a stranger does trespass to me, and one of his relations, or any other, gave anything to me for the same trespass, to which I agree, the stranger shall have advantage to bar me; for if I be satisfied, it is not reason that I be again satisfied, *quod tota curia concessit*."

The principle is the same whether the payment be conditional, or absolute in money, or by a promissory note; and hence, if such an instrument be taken in satisfaction from a stranger, and so pleaded by the defendant, the debt will be extinguished. See *Simpson v. Egger-ton*, 10 Excheq. 845; *Kemp v. Balls*, Ib. 607; *Leavitt v. Morrison*, 6 Ohio, N. S. 71; *Harrison v. Hicks*, 1 Porter, 123.

This results from the familiar doctrine that a ratification is equivalent to a command. Notes to *Culver v. Ashley*, 19 Pick, 300 (ante, vol. 1st). An act done by a man in his own right is not, however, susceptible of being ratified, even when the effect or design is to confer a benefit on another, or relieve him from liability. *Wilson v. Timmons*, 6 M. & G. 231; *Whitehead v. Peck*, 1 Kelly, 141; *The Rail Road Co. v. Gazzam*, 8 Casey, 340, 347; *Watson v. Swann*, 11 C. B., N. S. 756. A payment by a third person will not, therefore, satisfy the debt, unless it is made for and on behalf of the debtor, which must be averred and proved by him, and will not be implied by the law. 1 Smith's Leading Cases, 556, 558, 582, 6 Am. ed.; *James v. Isaacs*, 12 C. B. 791; *Daniels v. Hollenbeck*, 19 Wend. 423; *Jones v. Broadhurst*, 9 C. B. 173; *Smith v. Eggington*, 10 Exchequer, 84. This principle is of much moment in determining whether payment by one of the parties to a note or bill will extinguish the demand in favor of another. *Jones v. Broadhurst*; *Randall v. Moore*, 12 C. B. 261. In *Jones v. Broadhurst*, payment by the drawer was accordingly held not to be a defence to a suit against an accommodation acceptor. The general rule, however, clearly, is that satisfaction by the principal will, to prevent circuity of action, exonerate the surety. See 1 Leading Cases in Equity, 140, 3 Am. ed.

It was an old and well established rule of the common law, that if the right to enforce an existing cause of action was suspended by the act of the party for the briefest period, it was extinguished and discharged, and could never revive. *Ford v. Beech*, 11 Q. B. 842, 867; *Clark v. Snelling*, 1 Carter, 383; *Love v. Blair*, 6 Blackford, 282; *Chandler v. Herrick*, 19 Johnson, 129. A covenant not to sue, may be pleaded as a release, in order to avoid circuity of action; *Reed v. Shaw*, 1 Blackford, 118; *Cuyler v. Cuyler*, 2 Johnson, 186; *Hanson v.*



*Close*, Ib. 448; but a covenant not to sue before a day certain, or until default is made by a third person, is not a defence, although it may be made the ground of a recovery in damages. A plea that after the note in suit fell due, it was agreed between the plaintiff and the defendant, and one Alfred Beech, that the said Alfred should pay the plaintiff £25 yearly in quarterly payments, and that so long as he so paid the right of action on the notes should be suspended, was accordingly held insufficient in *Ford v. Beech*, by the Exchequer Chamber, reversing the judgment of the Queen's Bench, although it was averred that the agreement had been punctually performed by Alfred Beech.

It is not easy to reconcile this rule with the principle, that a note, payable at a future day, will suspend the debt, if so received. The difficulty was solved in *Ford v. Beech*, by referring the latter doctrine to the commercial, as distinguished from the common law. When, however, the question arose in *Belshaw v. Bush*, 11 C. B. 191, the court said that if a release was conditioned to fail on the happening of a contingency the release would be valid, and the condition void, but there was nothing to prevent the parties from agreeing by covenant, or for a valuable consideration, that an existing cause of action should be defeated if an act were done contrary to the agreement. A letter of license conditioned to extinguish the debt if the creditor sued before the time prescribed, was an instance of this sort, and might be pleaded in bar to a suit brought in contravention of the covenant. So when a note or bill was given in conditional payment, the debt would be barred if the creditor sued before the instrument matured, or while it was outstanding in the hands of a third person.

These distinctions are refined and logical, but they would hardly be recognized or applied in the United States. The doctrine that a suspension of the debt extinguishes it, is technical, and not a necessary or essential principle of jurisprudence. If a case like *Ford v. Beech* were to arise in this country, the courts would probably concur in judgment with the Queen's Bench. And we may doubt whether a judgment for the defendant, on the ground that a note has been taken as a conditional payment, should preclude the creditor from bringing another suit for the same cause after the dishonor of the instrument.

The presumption in favor of a gift of time may be excluded by the nature of the original cause of action, or the period at which the new security will mature. Taking a draft on demand or at sight, on a third person, may suspend the debt by rendering it the duty of the creditor to present the instrument to the drawee and give notice if it is not paid; *Jennison v. Parker*, 7 Michigan, 357; *The Phoenix Ins. Co. v. Allen*, 11 Id. 501, 509; but the debtor's note payable on demand, obviously does not imply an agreement for forbearance, and the

creditor may consequently proceed forthwith on the original demand. *Colburn v. Tollis*, 14 Conn. 341; *Fearne v. Cochran*, 4 C. B. 274; *Crofts v. Beale*, 11 C. B., N. S. 172.

A debt secured by specialty, will not, it has been said, be suspended by taking a note or bill, because an obligation under seal cannot be varied or discharged by parol, and from the natural presumption that the creditor did not mean to abandon a higher remedy for one of less degree. *Worthington v. Wigley*, 3 Bing. N. C. 454; *Drake v. Mitchell*, 3 East, 251; *Belshaw v. Bush*, 11 C. B. 191, 206; Byles on Bills, 304; *Gahn v. Niemciewicz*, 11 Wend. 372. In *Gahn v. Niemciewicz*, a note given in advance for the interest to accrue on a mortgage, was accordingly held not to suspend the remedy of the mortgagee. A similar principle applies in the case of rent which partakes of the nature of the realty, and cannot be extinguished by an act *in pais*, which falls short of a surrender of the term. *Davis v. Gyde*, 2 A. & E. 623; *Cornell v. Lamb*, 20 Johnson, 407; *Bosler v. Kuhn*, 8 W. & S. 183. In *Davis v. Gyde*, the plaintiff replied to an avowry in replevin, that before the goods were distrained, he gave his promissory note for the rent payable at a future day which had not arrived at the time of the distress. Lord Denman said, that rent whether reserved by deed or parol, was of equal degree with a debt by specialty. It followed that a promissory note, which was a security of an inferior degree, could not extinguish or suspend the rent. The damages resulting from a breach of covenant may, however, be discharged by an accord and satisfaction, although the covenant cannot; 1 Smith's Leading Cases, 557, 560; and if so they may well be paid conditionally by a note; and rent due and in arrear is a mere chose in action subject as it regards payment to the rules which govern other obligations. There is, consequently, no conclusive reason why arrears of rent or even a debt secured by a specialty, should be conditionally paid by a note. The question whether such a demand has been suspended or extinguished by a negotiable instrument, is therefore seemingly one of intention, the material difference being that while the law will draw the inference in the case of a simple contract, it will not in that of a bond. "The cases," said Maule, J., in *Belshaw v. Bush*, "in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment does not arise, when if it did, the plaintiff would be deprived of a better remedy than an action on the bill, as in *Davis v. Gyde*, in which the demand being for rent, the plaintiff would part with a remedy by distress: and as in *Worthington v. Wigley*, where the demand being on a bond, the plaintiff might have recourse to other funds than he could in an action on a simple contract." An argument of the

same kind was used in *Butts v. Dean*, 2 Metcalf, 76, and *The Kimball*, 3 Wallace, 37, 46; to rebut the presumption of satisfaction which arises in Massachusetts from taking a bill or note for an antecedent debt.

It is, accordingly well settled, that a promissory note will, when such is the express or implied agreement, operate to suspend or extinguish a debt due by specialty or for rent. *Fowler v. Bush*, 21 Pick, 230. The law was so held in *Baker v. Walker*, 14 M. & W. 465, with reference to a judgment which is of higher dignity than a bond. When, said Baron Parke, a man who has a judgment debt, takes from his debtor a promissory note for the amount payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and hence there is a good consideration for the giving of the note.

As the effect of negotiating a note or bill which has been taken in conditional payment, is irrespective of the nature of the demand for which it was received, it will presumably be a defence even when the suit is on a bond or for rent reserved. *Parrot v. Anderson*, 7 Excheq. 93. In *Brown v. Scott*, 1 P. F. Smith. 357, proof that a note had been given by a mortgagor for the amount due, and was outstanding in the hands of a third person, was notwithstanding held not to be an answer to a *scire facias* on the mortgage against a purchaser who had bought the land at a sheriff's sale to foreclose the mortgage, but this decision seems to have proceeded on the ground that the land having been taken subject to the mortgage, was primarily liable for the payment of the debt. See *Hansell v. Lutz*, 8 Harris, 284; *Burke v. Gummey*, 13 Wright, 518.

The doctrine that a note or bill is *prima facie*, a conditional payment which operates to suspend the debt, is a branch of the commercial as distinguished from the common law. It does not, therefore, extend to a bond or mortgage, or an assignment of chattels, deliverable at a future period. *The United States v. Hodge*, 6 Howard, 79; *Evans v. Widdowson*, 4 C. & P. 151; *Twopenny v. Young*, 3 B. & C. 208; *Burke v. Kruger*, 8 Texas, 66. Taking such an instrument as a security for an antecedent debt, does not, therefore, imply an agreement to forbear enforcing the principal demand, nor will it discharge a surety or endorser. In *Griffiths v. Owen*, 15 M. & W. 58, the court overruled a plea, to an action for not delivering certain promissory notes, that the defendant gave the plaintiff an order in writing, for the notes, on one Brown, in whose hands they then were, requesting him to deliver them to the plaintiff; that the order was received by the plaintiff for and on account of the notes, and of the promises set forth in the declaration; and that Brown was always ready and willing to deliver the notes in pursuance of the order, but that the plaintiff did not present the order, but kept the same for an unreasonable time, and until the notes were feloniously abstracted from Brown, without any

default on the part of the defendant. Pollock, B., said that it was established under *Chamberlain v. Delarive*, and *Kearslake v. Morgan*, that a draft or promissory note might be a conditional payment for a pecuniary demand. The plea was an attempt to extend the rule beyond its proper limits. Where the action was for money, the debtor might plead payment, and he might, therefore, plead anything that was equivalent to payment. A suit for an injury arising from the taking or non-delivery of goods, stood on a different footing. In such a case the plaintiff might recover damages, notwithstanding the redelivery of the goods. An order for the goods, therefore, could not be a valid satisfaction.

A promise to deliver a chattel at a future period may, however, seemingly be a consideration for a promise to forbear enforcing a pecuniary demand, or be a link in the chain of circumstantial evidence, from which the existence of such an agreement is deduced; and the law was so held in *Bates v. Churchill*, 32 Maine, 31.

The notes of the corporations chartered by the States and the United States, as banks of issue, stand on a different footing from ordinary promissory notes, and will be presumed to have been received in absolute payment, unless the contrary appears. *Bayard v. Shunk*, 1 W. & S. 92; *Lowry v. Murrell*, 2 Porter, 282; *Scruggs v. Gass*, 8 Yerger, 175; *Ware v. Sheet*, 2 Head, 609; see *Wainwright v. Webster*, 11 Vermont, 576. A currency directly or indirectly authorized by the government, cannot be regarded in the same light as the engagements of an individual. It was accordingly declared by Lord Mansfield, in *Miller v. Race*, 1 Burrow, 452, that "such instruments are not goods nor securities, nor documents for debts, but are treated as money, as cash, in the ordinary transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in common payments as money or cash." The principle is well established in this country, and we may presume from the language held in *Miller v. Race*, that it applies to the notes of the Bank of England, although the point does not seem to have arisen.

It is a consequence of this doctrine that such instruments are at the risk of the person by whom they are received, who cannot proceed on the original demand if they prove valueless through the subsequent failure of the maker; and it has been said that this result will follow even when the payment is made in the notes of a broken or insolvent bank. *Lowry v. Murrell*, 2 Porter, 282; *Ware v. Street*, 2 Head, 609. The law was so held in *Bayard v. Shunk*, 1 W. & S. 92, with reference to an antecedent debt, and perhaps with more reason in

*Scruggs v. Gass*, 8 Yerger, 175, where the notes were given for a contemporaneous sale.

In *Bayard v. Shunk*, the sheriff of Dauphin county was about to proceed to execution on a judgment, when one Hickoks, to whom the goods levied on had been sold, paid the debt in notes of the Commercial Bank of Millington, and took a receipt in full. This was on the 14th of October, and it was agreed in the case stated for the opinion of the court, that the notes were worthless in consequence of the failure of the Commercial Bank on the preceding day. The judgment creditor who had received the notes as in full from the sheriff, did not ascertain the failure of the bank until the 19th of October, when he offered to return the notes, which were refused. Millington is at some distance from Harrisburg, and the notes were still current in the latter place when the payment was made. Gibson, Ch. J., said that the weight of authority was decisively in favor of the position that a *bona fide* payment in the notes of a broken bank discharged the debt. They derived the quality of money from the conventional laws of trade, and did not lose it in the failure of the makers. To assume that the solvency of the bank was an inherent condition, was to beg the question. Where both parties were innocent, there was no equity on either side; and the law was with the party who had given value in a shape which the other agreed to receive as cash.

The fallacy in this argument seems to consist in overlooking that such a payment is an exception to the general rule, under which paper will not satisfy the debt unless it is so agreed. This exception is based on the assumption that such instruments are to be paid away as money in the ordinary course of business, instead of being collected as securities. If bank notes are not money, they resemble it in the capacity for passing current from hand to hand. When this distinguishing characteristic is lost from any cause, the reason of the exception fails, and the case comes under the ordinary rule that if notes which have been given in payment are dishonored, the creditor may enforce the original demand. *Wainwright v. Webster*, 11 Vermont, 576; *Lightbody v. The Ontario Bank*, 19 Wendell, 9; *Fogg v. Sawyer*, 9 New Hampshire, 65.

In *Wainwright v. Webster*, Bennet, J., said, "that bank bills were for many purposes treated as money, but this was a conventional rule designed to facilitate the transaction of business. It was founded on the supposition that such bills were equivalent in value to specie, and were convertible into specie at the option of the holder. It was on this ground, that such instruments were commonly received and passed as cash, that the law drew the inference of satisfaction which did not arise in the case of ordinary promissory notes. Such a payment was, however, subject to an implied condition that the bank was solvent and able to redeem its notes. When it stopped payment, the bills ceased

to be the representative of money and became mere promissory notes. A payment in the bills of a broken bank consequently would not satisfy the debt."

It was held in like manner in *Lightbody v. The Ontario Bank*, 11 Wend. 19; 13 Id. 101, that when the bills of a bank which has failed are received in payment, the loss will fall on the person who pays, and not on him who receives the bills, although both act in good faith, and the failure of the bank is not known at the place where the payment is made. And when the question arose in *Fogg v. Sawyer*, 9 New Hampshire, 365, the court said that the plaintiff was as much entitled to good bills, if he consented to take bills, as he would have been to good coin if the payment had been made in specie. The current of authority is in accordance with these decisions, and against the rule laid down in *Bayard v. Shunk*; *Harley v. Thornton*, 2 Hill, S. C. 509 (note), *Westfall v. Braley*, 10 Ohio, N. S. 188; *The Frontier Bank v. Morse*, 22 Maine, 28; *Townsend v. The Bank*, 7 Wisconsin, 185, and the principle is the same where bank notes are sold or exchanged for other notes or for cash. *The Frontier Bank v. Morse*; *Townsend v. The Bank*.

It is, however, generally conceded, that the notes must be returned within such a reasonable time as will enable the debtor to trace out the person from whom they were received, and obtain an indemnity from him. If the creditor is guilty of laches in this particular, he must bear the loss. *Cambridge v. Allenby*, 6 B. & C.; *Thomas v. Todd*, 6 Hill, 340. In *Thomas v. Todd*, a delay from the fifth of May to the fourth of July, was said to be unreasonable.

There is, however, a marked difference in this respect between bank notes and promissory notes in general. When payment is made in instruments of the latter description, the debtor is not answerable unless they are presented within a reasonable time; but there can be no laches in circulating without presenting instruments which are intended for circulation. This is true within certain limits of an ordinary bill of exchange payable on demand or at sight; *Goupy v. Harden*, 7 Taunton, 160; *Fry v. Hill*, 1b. 193; *Shute v. Robbins*, 3 C. & P. 80; *Mellish v. Rawdon*, 9 Bing. 426; *Camidge v. Allenby*, 6 B. & C. 373, and applies in a much greater degree to the notes of a bank. All that can reasonably be asked, therefore, of the creditor is, that he should return the instrument within a reasonable time after learning the insolvency of the bank. *Townsend v. Racine*, 7 Wisconsin, 185.

The authorities agree that if the bank is solvent when the payment is made, the debtor will not be responsible for a loss arising from a subsequent failure. It is, therefore, material to ascertain what failure is within the meaning of this principle. Ordinarily, insolvency is a question of fact, depending on the ratio between assets and liabilities,

and open to the whole range of parol evidence. *Douglass v. Reynolds*, 12 Peters, 497 (ante, 134). But it is difficult to believe that a creditor who takes bank notes in payment, can adduce facts and figures to show that a subsequent failure of the bank was due to causes existing when the notes were given. Such an investigation might be too intricate and laborious for the ends of justice. The true inquiry in such cases, therefore, seems to be whether the bank had failed, in the ordinary sense, by closing its doors or stopping payment.

The sale or transfer for value of a note, bill, bond, or other security, implies a warranty that it is genuine and duly signed. A payment in spurious or counterfeit bank notes, is consequently invalid, and will not be a defence to the original demand. *Young v. Adams*, 6 Mass. 132; *The Salem Bank v. The Gloucester Bank*, 17 Id. 133; *Market v. Hatfield*, 2 Johnson, 459; *The Grafton Bank v. Hunt*, 4 New Hampshire, 492; *Bayard v. Shunk*, 1 W. & S. 92, 99; *Keen v. Thompson*, 4 Gill & J. 413.

Taking a bill or note for a pre-existing debt may be attended with other consequences which may now be considered. It has been seen that when the note is payable at a future day, the debt is suspended until the instrument matures. If the new security is made or accepted by the debtor, it will then be his duty to seek out and pay the creditor, and if he does not, the latter may proceed on the original cause of action.

When, however, a third person is responsible for the payment, the obligation of diligence is thrown on the creditor, and it will be incumbent on him to pursue the usual course of business by presenting the instrument at maturity, and giving notice if it is dishonored. *Jennison v. Parker*, 7 Michigan, 355; *The Phoenix Insurance Company v. Allen*, 11 Id. 501; and if he is guilty of laches in this respect, it will be a defence to the extent of the resulting injury. *Gordon v. Price*, 10 Iredell, 385; *Jones v. Savage*, 6 Wend. 658, 662 (ante, 251); *Brown v. Cronise*, 21 California, 386. In taking the new security, the creditor accepts the duty of making it available for the purpose for which it was given, and cannot recover on the consideration if this duty is not fulfilled. *Shipman v. Cook*, 1 Green's Ch. 254; *McLughan v. Bovard*, 4 Watts, 308; *Gallagher's Ex'rs v. Roberts*, 2 W. C. C. R. 191; *Foote v. Brown*, 2 McLean, 369; *Hamilton v. Cunningham*, 2 Brockenbrough, 350; *Ayres v. Van Loan*, 2 Southard, 765; *Torry v. Baxter*, 13 Vermont, 482. In the language of the Supreme Court, in *Douglass v. Reynolds*, 12 Peters, 497 (ante, 49), "he who receives any note upon which third persons are responsible, is bound to use diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged."

The delivery and receipt of a negotiable instrument, on account of a debt, was accordingly declared to be payment by the third and fourth

Anne. c. 9, s. 7, if the creditor does not take the due course to obtain payment thereof, by endeavoring to get the same accepted and paid. If the instrument is made payable to a third person, as in the case of *Richardson v. Rickman*, cited in *Kearslake v. Morgan*; or is made by a third person as in the case of *Kearslake v. Morgan*, 5 Term, 513, a plea stating the delivery and acceptance of the negotiable instrument, is a defence in the first instance. If the plaintiff has taken up the bill in the former case, or presented the note at maturity in the latter to the maker, and given due notice of dishonor to the defendant, these facts may be set forth in the replication, and will, if established in evidence, entitle the plaintiff to judgment. *Price v. Price*, 16 M. & W. 240; *Hoar v. Clute*, 15 Johnson, 224; *Morgan v. Betzenberger*, 3 Gill, 350.

That the plaintiff took the note or bill of a third person for and on account of the cause of action, is consequently a good defence, which can only be overcome by showing that he used due diligence; *Denniston v. Imbrie*, 3 W. C. C. R. 396; *Robson v. Oliver*, 10 Q. B. 704; *Kephart v. Butcher*, 17 Iowa, 240; *Jennison v. Parker*, 7 Michigan, 355; *The Phoenix Ins. Co. v. Allen*, 11 Id. 501; *Star v. Kerr*, 31 Mississippi, 199; *Gordon v. Price*, 10 Iredell, 385; or that the debtor was not injured by his neglect (ante, 122). A plea that the plaintiff had accepted the note of a third person for the debt in suit, was accordingly held sufficient in *Kearslake v. Morgan*. The rule applies whenever the nature of the instrument makes it incumbent on the creditor to look elsewhere before seeking to charge the defendant. In *Chamberlain v. Delarive*, 2 Wilson, 353, the debt was accordingly held to be extinguished by the failure of the creditor to present a draft on a third person who subsequently became insolvent. The same principle was applied in *Brown v. Jones*, 3 Johnson, 230; and *Woodcock v. Bennet*, 1 Cowen, 711; and when the question arose in *Dayton v. Trull*, 23 Wend. 345 (ante, 25), the court said that a man who takes a bill for an existing demand, cannot sue and recover on the consideration, without showing such a state of facts as would authorize a recovery if the suit were on the bill.

It is established under these decisions that taking a bill or note payable by a third person, is a conditional payment, rendering it incumbent on the creditor to show that he used the diligence required by the law merchant, or that his laches were not injurious to the debtor. *Starr v. Kerr*, 21 Miss. 191; *Jennison v. Parker*, 7 Mich. 335; *The Phoenix Ins. Co. v. Allen*, 11 Id. 509; *Glenn v. Smith*, 2 Gill & J. 493; *Morrison v. Welty*, 18 Md. 869.

It was said in *Dayton v. Trull* (ante, 251), that, "although the bills were not to operate in satisfaction until paid, it was the duty of plaintiff to present them, and until he showed such a state of facts as would authorize a recovery of the bills themselves, he could not recover on



the consideration." Presentment, notice of dishonor, and the production of the instrument at the trial, were, therefore, conditions precedent, without which the action must fail.

If this language is to be understood literally, the creditor cannot fall back on the consideration in any case where he could not succeed if the suit were brought directly on the instrument. In general, notice is equivalent to knowledge, and the law will not compel the performance of an act which would be vain or useless. When, however, the suit is against a drawer or endorser, the insolvency of the drawee will not dispense with presentment, nor will a failure to give notice be excused by showing that the dishonor of the instrument was known to the defendant. *Estdale v. Sowerby*, 11 East, 114; *Nicholson v. Goldthwaite*, 2 H. Bl. 609; *Russel v. Langstaff*, 1 Douglass, 497; *Gower v. Moore*, 25 Maine, 16; *May v. Corwin*, 12 Mass. 341; *The Juniata Bank v. Hale*, 16 S. & R. 167; Byles on Bills, 234, 236. In *Deniston v. Imbrie*, 3 W. C. C. R. 396, 401, the rigor of this principle was applied in a suit on the consideration; and it was said that the insolvency of the drawers, or the want of funds on the part of the drawee, could not be taken into view in determining whether the defendant was discharged by the failure of the plaintiff to present the bills which had been given for the debt. A similar ground was taken in *Jennison v. Parker*, 7 Mich. 355; and *The Phoenix Ins. Co. v. Allen*, 11 Id. 501; and the cases of *Glenn v. Smith*, 2 Gill & J. 493; and *Morris v. Welty*, 18 Md. 169, point in the same direction. In *Price v. Price*, 16 M. & W. 240, a plea alleging that a note payable by, or to a third person, has been given and accepted for the debt, was said to be a good answer in the first instance, and that it would then be for the plaintiff to show that the instrument had been taken up in the former case, or presented at maturity in the latter, and due notice of dishonor given to the defendant. So Mr. Byles states, that if the creditor fails to give notice of dishonor, he will make the bill his own, which implies that no remedy can be had against the debtor. Byles on Bills, 229; *Smith v. Mercer*, 3 Exchequer, L. R. 51 (post). And two recent and authoritative treatises lay down the rule that the negligence of the creditor is a bar, in terms which indicate that it cannot be excused by evidence that nothing would have been gained by diligence. 2 Parsons on Notes, 154; Edwards on Bills and Notes, 198, 201.

A different and, as it would seem, a more reasonable doctrine was advanced in *Gallagher's Ex'rs v. Roberts*, 2 Washington C. C. R. 191. The court said that a bill taken as conditional payment would not satisfy the debt unless it was paid, or some injury resulted from the laches of the creditor, as, if in the meantime, the drawee failed, or the recourse against the drawers or endorsers was thereby lost. Neither would such a bill operate as payment if the debtor had no right to draw, or there

were other circumstances indicating that he knew the paper to be worthless. The rule which prevented the holder of a bill from recovering upon it unless he proceeded regularly to presentment and notice, did not apply to the case of a creditor suing for a debt which had been paid by a note or bill. In the former case the bill was received by each successive holder, subject to a condition that he would use due diligence, and his failure in that regard was consequently fatal to the right of action. In the latter the instrument was not a satisfaction unless the amount was lost by the neglect of the creditor. It was said in like manner in *Kelsey v. Rosburg*, 2 Richardson, 241, that the note of a third person, would not operate as payment without proof of loss through the negligence of the plaintiff. And when the question arose in *Kephart v. Butcher*, 17 Iowa, 240, the criterion was said to be actual loss or prejudice, and that the creditor might recover notwithstanding the want of presentment and notice, if he could adduce satisfactory evidence that his laches were not injurious to the defendant. The cases of *Bradford v. Fox*, 38 New York, 289; *Gibson v. Toby*, 53 Barb. 192, and *Johnson v. The Bank of North America*, 5 Robertson, 554, proceed on the same principle, and in *Gibson v. Toby*, the plaintiff was held entitled to recover, although twenty-five days elapsed between the dishonor of the draft and his offer to return it to the defendant.

The authorities in England lay down an intermediate rule, under which the insolvency of the maker or drawee may obviate the necessity for presentment; *Turner v. Stones*, 1 Dowling & L. 122; but the creditor must tender or return the instrument forthwith, or within such a reasonable time as will enable the debtor to provide for his own safety. *Rogers v. Langford*, 1 Cr. & M. 637, 643; *Camidge v. Allenby*, 6 B. & C. 373 (ante, 122). In *Camidge v. Allenby*, where the notes of an insolvent banking house were given for goods which had been sold in the forenoon of the same day, and retained by the vendor for six days without returning them or notice to the purchaser, he was held to be precluded from recovering on the consideration. In *Robson v. Oliver*, 10 Q. B. 704, the defendant pleaded to a declaration for goods sold, that he had given the notes of a third person in payment, which were not presented within a reasonable time. The reply was that the maker was insolvent when the notes were given, and that afterwards, and before a reasonable time for presentment, the plaintiffs discovered such insolvency, and subsequently within a reasonable time gave notice thereof, and offered to return the notes. The defendant rejoined that the plaintiff did not give the notice until after the expiration of a reasonable time for presentment. The court said that the holder of a note ought to communicate instantly his knowledge that the party to whom it was to be presented had become insolvent. But the rejoinder did not sufficiently raise this point. The replication

averred that the maker was bankrupt when the notes were given, that this was discovered by the plaintiffs before a reasonable time for presentment had elapsed, and that they afterwards, within a reasonable time, offered to return the notes. This was a sufficient excuse for non-presentment. If there had been an unreasonable delay in giving notice, the case would have been very different. By such laches the plaintiff would have rendered the notes his own, and could not have relied on the insolvency of the maker as an excuse.

It is clear that the transfer of a note or a bill unendorsed, imposes no liability, and that an endorser is not liable as such, except in strict conformity to the rules of the mercantile law. But the question whether such a transfer will discharge a pre-existing liability, is a different one depending on circumstances, and which does not admit of a uniform rule. *Bicknall v. Waterman*, 5 Rhode Island, 49, 53. If the instrument was given and received in absolute payment, there can be no further liability. When, however, the payment is conditional, it is necessary to inquire what the true condition is, whether it has been fulfilled, and what injury, if any, has resulted from the breach. See *Van Wart v. Hooley*, 3 B. & C. 439; *Hickling v. Hardy*, 7 Taunton, 313.

It is on the last point that there is most room for doubt. All the authorities agree that a failure to present the instrument, gives rise to a presumption of injury, which will be a defence unless repelled. The difference is as to whether this presumption can be met and overcome by proof. The dicta cannot be reconciled, but there has as yet, seemingly, been no decision in the United States, that the negligence of the creditor will be a bar in the face of proof that all the parties to the instrument were insolvent when it matured, and that no injury has been sustained by the debtor. Under these circumstances, demand and notice are a mere formality, which should not be exacted by the law. The opposite rule which makes a draft on a bankrupt or insolvent an extinguishment of the debt, unless the creditor goes through the ceremony of asking for that which he knows will be refused, is harsh and may be thought needlessly rigorous.

Whatever the rule may be under other circumstances, it is well settled that when the new security is merely collateral, a failure to present the instrument for payment and give notice of dishonor, will not be a defence unless it results in actual injury. *Swingard v. Bowes*, 5 M. & S. 62; *Pring v. Clarkson*, 1 B. & C. 14; *Simons v. Steel*, 36 New Hampshire, 386; *Powell v. Henry*, 20 Alabama, 612. A creditor who takes a bill or note as collateral security, stands in the position of an agent or trustee, and must protect the interest of the debtor as well as his own, but he is not within the strict rule of the commercial law, and will not be answerable

for want of diligence unless it results in actual loss. *Lawrence v. McCalmont*, 2 Howard, 426; *Roberts v. Thompson*, 14 Ohio, N. S. 1; *Leigh v. Baldwin*, 10 Georgia, 208. A similar view was taken in *Tan Wart v. Woolley*, 3 B. & C. 439, with reference to a bill sent to the plaintiff in advance, and as part payment of an order for hardware, which the plaintiffs were to buy on commission, although the plaintiff was the agent rather than the creditor of the parties who made the remittance; and again, in the *Bank of Rutland v. Woodruff*, 34 Vermont, 89, where Poland, C. J., said it was "a novel doctrine that a creditor holding collateral securities for a debt, cannot enforce his debt without first surrendering his securities. He is entitled to hold them till he gets his pay, then they belong to the debtor. The cases where a creditor has taken one security in place of another, but has a right to return that and resort to his original demand, are not in point." The plaintiff was accordingly allowed to recover without producing the securities which he held for the debt. The doctrine that the creditor need not give an account of the collateral securities unless it is demanded, and may recover without producing them at the trial, is also sustained by *Lord v. The Ocean Bank*, 8 Harris, 384, and *Street v. Hall*, 29 Vermont, 165. And in *The F. & M. Ins. Co. v. Mather*, 10 Wright, 504, 507, the court held that one collateral security might be exchanged for another differently endorsed, without the knowledge or consent of the debtor, if both instruments appeared to be equally valuable or equally worthless. Every such act, however, is at the risk of the creditor, who cannot recover without showing that it did not result in injury; and there can be no doubt that, when the want of demand or notice places the debtor in a worse position by discharging a drawer or endorser, it will be a defence to the extent of the resulting injury, whether the security was a conditional payment or merely collateral. *Jennison v. Parker*, 7 Michigan, 355, 360; *Lawrence v. McCalmont*, 2 Howard, 426, 451.

Taking a bill or note for a debt may give rise to another head of defence, which should now be stated. The transfer of the instrument to a third person will confer a right of action on him, and if the creditor could still enforce the original demand, two distinct recoveries might be obtained for the same cause. Such a transfer is, therefore, a *prima facie* defence, which may, however, be met and overcome by showing that the plaintiff has taken up the instrument and has it in court for surrender or cancellation. *Maillard v. The Duke of Argyll*, 6 M. & G. 40; *Burden v. Haldon*, 4 Bing. 454; *Small v. Jones*, 8 Watts, 265; *Spear v. Atkinson*, 1 Iredell, 262; *Harris v. Johnston*, 3 Cranch, 311; *Shaw v. Gorkin*, 7 New Hampshire, 16; *Holmes v. De Camp*, 1 Johns. 34; *Burdick v. Given*, 15 Id. 247; *Humphries v. Wheeler*, 8 Cowen, 77; *Bowen v. Scott*, 1 P. F. Smith, 257, 364; *Black v.*

*Zacharie*, 3 Howard, 485, 518. "If," said Kennedy, J., in *Sewall v. Jones*, "a person lend money and take a note payable at a future day in payment of it, and then parts with the note for a valuable consideration, he cannot sue either on the note or the original cause of action, until he has taken up the note." It was said in like manner in *Black v. Zacharie*, that when a bill drawn by a debtor in favor of the creditor for the amount due, is accepted by the drawer, and negotiated to a third person, suit cannot be brought until the bill is due and dishonored, and taken up by the creditor.

In *Belshaw v. Bush*, 11 C. B. 191, a plea that the plaintiff had taken the acceptance of a stranger for and on account of the debt and endorsed it over to a third person, in whose hands it was still outstanding, was accordingly held good, as showing a conditional payment, which though not made by the defendant, became valid upon his ratification of the act, by setting it up as a defence to the suit. Under such circumstances the debtor is not liable to be sued by two different persons; but different suits may be brought; one by the creditor on the consideration; the other by the holder of the instrument against the maker or acceptor, and the only way of obviating this inconvenience is to hold that the former cause of action cannot be enforced, unless both are united in the same hand.

To this extent the authorities agree, but there has been some divergence of opinion as to the mode in which such a defence should be presented, and whether the burden of proof is on the plaintiff or defendant. In *Mercer v. Cheese*, 4 M. & G. 804, the defendant pleaded that the promises in the declaration mentioned, were made by him jointly with one Thomas Morris, and that before action brought, the plaintiff drew a bill on Morris for the amount due, which he accepted and delivered to the plaintiff, who received the same for, and on account of the said amount and promises. It was contended that this plea was bad, because it did not show either that the bill was still running to maturity or that it had been transferred to a third person. The plea was, however, held valid as rendering it incumbent on the plaintiff to reply that the bill was overdue and had not been negotiated. It appears, said Tindall, Ch. J., that the plaintiff has received a security susceptible of assignment; he can tell whether he has parted with it, but the defendant cannot.

The Court of Exchequer were, on the other hand, of opinion in *Price v. Price*, 16 M. & W. 232, that a plea that the note or acceptance of the defendant has been taken for and on account of the debt, must show that the instrument is still running, or that it has been transferred and is outstanding in the hands of a third person. The decision was based, in great measure, on the maxim that things are to be presumed to continue in the same state till the contrary appears, which was said

to make it incumbent on the defendant to aver that the plaintiff parted with the note before issue was joined. Parke, Baron, said, that if the note had been payable to a third person, as in *Richards v. Rickman*; cited in *Kearslake v. Morgan*, 5 Term, 513; or payable by a third person as in *Kearslake v. Morgan*, it would have been necessary for the plaintiff to reply that he had taken up the note in the former case, or presented it at maturity in the latter, and given notice that it was dishonored to the defendant. But a plea that the negotiable note of the debtor had been given for the debt, which did not show that the instrument had not yet matured, was not an answer unless it also averred that the note had been transferred and was outstanding in the hands of a third person. Otherwise, for all that appeared in such a plea, the note might be due and unpaid in the hands of the plaintiff, who would consequently be entitled to maintain the action.

• • A similar view was taken in *Burdick v. Green*, 15 Johnson, 247, where a plea that a note had been taken on account of the debt and endorsed to a third person was held invalid, because giving a negotiable security and its endorsement over do not extinguish the original demand, if the plaintiff can show that the instrument is destroyed or lost or produce it to be cancelled at the trial. In *Hughes v. Whelan*, 8 Cowen, 77, the court held on the authority of this decision that such a defence cannot be made by plea, and must be taken advantage of under the general issue, because a note which is outstanding at the time of action brought may be taken up and surrendered at the trial. And in *Burden v. Halton*, 4 Bingham, 54, an allegation that a bill had been given for the debt and was outstanding in the hands of a third person, was held to be sufficiently answered by proof that the instrument had been returned to the plaintiff, and would be cancelled or surrendered on payment. Best, C. J., said "that there was no evidence that the bills had been transferred for value, and they had been returned without any money passing. The authorities showed that if they had remained in the hands of third persons, it would have been a defence, because the defendant might have been called on to pay them; but as they were held by the plaintiff, and overdue at the time of trial, that could never happen."

It would seem to be established in England that where the instrument is in the hands of a third person at the time of action brought, the plaintiff must fail, unless the plaintiff can succeed in showing that it is held for him, or on a consideration which has failed. *Hudwin v. Mendezabel*, 10 Moore, 497; *Burdin v. Halton*, 4 Bing. 54; *Small v. Jones*, 8 Watts, 265. In *Small v. Jones*, Kennedy, J., said that a creditor who takes the note of the debtor and negotiates it for value, must take it up before suing on the consideration; but that when the holder is his agent, or did not give a valuable consideration, it is

sufficient to produce the instrument at the trial; and this distinction was acted on, in *Brown v. Scott*, 1 P. F. Smith, 357. The authorities in New York, however, imply that it is enough under all circumstances to have the note in court, and surrender it when the case is tried (ante, 251), *Hughes v. Wheeler*, 8 Cowen, 77.

It is proper to add in this connection, that a note payable to a third person will have the same effect on delivery as a note drawn to the order of the creditor and endorsed by him, and that when such a payment has been made, a suit cannot be maintained on the original demand, without taking up the instrument and holding it in readiness to be surrendered. *Price v. Price*, 16 M. & W. 232, 241.

Whatever the rule may be with regard to the question of pleading raised in *Mercer v. Cheese* and *Price v. Price*, it is well settled in general, both in England and the United States, that a creditor who takes a negotiable instrument bearing the name of the debtor or of a third person conditionally in payment, cannot enforce the original demand without showing that the instrument is held by him or subject to his control. *Crowe v. Clay*, 8 Excheq. 295; 9 Id. 604; *Price v. Price*, 16 M. & W. 232, 238; *Belshaw v. Bush*, 11 C. B. 191.

The production of the note is obviously the best, and perhaps the only satisfactory evidence that it is held by the creditor, and will be surrendered on the payment of the debt. *Small v. Jones*, 8 Watts, 265; but the point is one about which the authorities are not altogether clear. In *Hadwin v. Mendezabel*, 10 Moore, 477, the court held that if the instrument was shown to be in the hands of the plaintiff, or controlled by him, it need not be produced. Best, Ch. J., said that the bills were proved to be in the possession of the plaintiff's agent, and might properly be withheld until the defendant was ready to pay the debt. The defendant might pay the money into court, and move for a stay of execution, until the bills were surrendered, but there was no sufficient reason for setting aside the verdict. This decision is, seemingly, irreconcilable with the doctrine of *Crowe v. Clay*, 9 Excheq. 604, that the plaintiff must make out his case with the same strictness in proceeding on the consideration, as if the suit were brought directly on the bill; and in *Hays v. McClurg*, it was said to be necessary to produce the bill or show that it was lost or destroyed. Agreeably to the American decisions, the proper mode of taking advantage of such a defence is under the general issue at the trial; *Hughes v. Wheeler*, 8 Cowen, 77; and it has been said, that if the point is not made then, the defendant cannot require the instrument to be produced subsequently, or rely on the failure of the plaintiff to surrender it as a reason for a new trial. *Bill v. Porter*, 9 Connecticut, 23.

If the question be still open, there would seem to be much reason for adopting the doctrine of *Hadwin v. Mendezabel*, that when the

existence of the debt is admitted, and the non-production of the securities given for it the only ground of defence, judgment should be rendered for plaintiff and the money paid into court, with a proviso that it shall not be taken out until the instrument is forthcoming, or the defendant satisfactorily indemnified against loss.

It was intimated in *Hays v. McClurg*, 4 Watts, 452, that the failure of the plaintiff to produce the instrument, may be excused by showing that it has been lost, and the same opinion has been expressed in other instances. This view is at variance with the well established principle, that the maker of a negotiable instrument is entitled to have it produced, as the only sure safeguard against being compelled to pay the demand twice. *Crowe v. Clay*, 8 Exchequer, 295, 9 Id. 604. In *Crowe v. Clay*, a plea that the defendant gave and the plaintiff received a bill for, and on account of the debt, and that the plaintiff afterwards lost said bill, and was unable to produce the same, was accordingly sustained by the Exchequer chamber reversing the court below. The judgment was delivered by Coleridge, J., in the following terms, "a bill given for and on account of money due on simple contract operates as a conditional payment, which may be defeated at the option of the creditor if the bill is unpaid at maturity in his hands, in which case he may rescind the transaction of payment and sue on the original demand. *Griffiths v. Owen*, 13 M. & W. 58, 64; *James v. Williams*, 13 M. & W. 828. If the bill be lost, the condition on which the payment may be defeated does not arise; *Belshaw v. Bush*, 11 C. B. 191, 201, and the defendant if compelled to pay the original debt, would be subject to inconvenience of a like kind as if compelled to pay the bill. Accordingly it was held at Nisi Prius in *Woodford v. Whitely*, Moo. & M. 517, that a debt paid by a lost bill could not be recovered, and the like law was assumed in the cases of *Mercer v. Cheese*, 4 M. & G. 804, and *Price v. Price*, 16 M. & W. 232. It appears, therefore, that the loss of a negotiable bill given on account of a debt, is an answer to an action for the debt as well as to one on the bill."

The appropriate remedy of the creditor in such cases lies in a recourse to equity, which will enforce the payment of the instrument on the tender of an adequate indemnity; *Thayer v. King*, 15 Ohio, 242; *Burrows v. Goodhue*, 1 Iowa, 48; *Rowley v. Ball*, 3 Cowen, 303; *Pintard v. Tackington*, 10 Johnson, 102; although redress will be afforded in some of the States of this country on the same principle at law. *Jones v. Fales*, 5 Mass. 101; *Fales v. Russell*, 16 Pick. 315; *Smith v. Rockwell*, 2 Hill, 432. See *Tomlinson v. Price*, 5 Vesey, 238; *Hansard v. Robinson*, 7 B. & C. 90; *Ramuz v. Crowe*, 1 Excheq. 167.

Although the note or acceptance of the debtor, payable on demand, does not suspend the debt in the first instance; See *Colburn v. Tollis*, 14 Cowen, 341; *Fearn v. Cochran*, 4 C. B. 274; *Crofts v.*



*Beale*, 11 Id. 172 (ante); it will, notwithstanding, be a defence, if negotiated and outstanding at the time of action brought. And when such an instrument is drawn upon or made by a third person, the creditor must present it in due course and give notice if it is dishonored; and a failure in this respect will be a discharge, unless it is shown that no injury resulted from the default (ante, 289). *Chamberlain v. Delarive*, 2 Wilson, 353; *Bradford v. Fox*, 39 Barb. 203.

We may now advert to another question which arises where the note or acceptance of a third person is given in payment for a cotemporaneous sale. Under these circumstances the question is not so much whether the debt is extinguished, as whether there ever was a debt. Strictly speaking, such a transaction is an exchange rather than a sale, and the purchaser is under no greater liability than if one chattel had been given for another. *Darnall v. Moorehouse*, 36 Howard Practice R. 511, 521; *Gibson v. Toby*, 53 Barb. 191, 195. This is indisputable, when the agreement is explicit to take the note or acceptance of a third person for the goods, *Bicknell v. Waterman*, 5 Rhode Island, 43; *St. John v. Purdy*, 1 Sandford, 9; *Devlin v. Chamberlin*, 6 Minnesota, 468; and may be presumed when all that appears or can be ascertained is, that such an instrument was received in payment at the time. *Long v. Spruill*, 7 Jones, 96; *Noel v. Murray*, 1 Duer, 35; 3 Kernan, 161; *Bayard v. Shunk*, 1 W. & S. 92, 94; *Bromley v. Dugan*, 2 Hill, 508; *Soffee v. Gallagher*, 3 E. D. Smith, 507; *Shriner v. Keller*, 1 Casey, 62; *Gibson v. Toby*, 53 Barb. 191.

This results from two principles, which may be regarded as indisputable, one that the transfer of a note or bill does not impose any liability, unless it is endorsed; Byles on Bills, 122; *The Bank of England v. Newman*, 1 Lord Raymond, 442; *Everly v. Lye*, 15 East, 7; *Long v. Spruill*, 5 Jones, 96; *Bicknell v. Waterman*, 5 Rhode Island, 43, 48; the other, that a man who has got what he stipulated for, cannot justly complain because it proves less valuable than his anticipations led him to believe. In the analagous case of the exchange of one horse for another, or for chattels of any kind, no one would contend that if the horse died or proved worthless, redress could be had in *indebitatus assumpsit*. The remedy, if any, would be in an action for a breach of warranty or of deceit.

The distinction is between the delivery of a note or bill for an antecedent debt, and for a consideration passing at the time; in the former case, the question is one of satisfaction, depending on whether the new agreement discharged the old; in the latter, the delivery of the note is presumably a fulfilment of the contract. *Roberts v. Fisher*, 53 Barb. 69. It is well settled, said Duer, J., in *Noel v. Murray*, that where there is an antecedent debt, the onus is upon the party who alleges that a note was received in payment. But where no such debt

exists between the parties, and one of them delivers property to the other, and receives in return the note of a third person in full or part payment and gives a receipt accordingly, the presumption is it was so received, and the onus is then upon the party who received it to show the contrary. The same rule was laid down in *Bayard v. Shunk*, 1 W. & S. 92, and *Young v. Stahelin*, 34 New York, 265. The principle was stated by Lord Holt, in *Clark v. Mundall*, 1 Salkeld, 124; 12 Modern, 203. "A bill," said he, "without payment shall never go in discharge of a precedent debt, except to be a part of the contract that it should be so. If A. sells goods to B., and B. is to give a bill in payment, though this bill be never paid, B. is discharged because the bill is payment. But otherwise a bill shall never, without payment, discharge a precedent debt or contract." It was said in like manner by the same great authority in *Ward v. Evans*, 2 Lord Raymond, 928, 930, that taking a note for goods sold is a payment, because it was a part of the original contract, but paper is no payment where there is a precedent debt. And in *Camidge v. Allenby*, 6 B. & C. 363 (ante, 122), where the question was whether the debt was discharged by payment in the notes of a banker who had failed on the previous day, the court said, that if the notes had been given at the time of the sale, the payment would have been absolute, notwithstanding the insolvency of the maker.

In *Bicknell v. Waterman*, 5 Rhode Island, 43, the written memorandum of the broker showed that the goods were sold "for the note;" but the effect will be the same where the intention of the parties appears from their language as narrated by the witnesses. When, however, all that appears from the evidence is that the goods were sold, and the note of a third person given for the price, the question is necessarily one depending on the circumstances. *Bicknell v. Waterman*, 5 Rhode Island, 43, 49; *Lightbody v. The Ontario Bank*, 11 Wend. 9, 15; *Alcock v. Hopkins*, 6 Cushing, 484, 490; although the presumption will still be in favor of regarding the transaction as an exchange of one form of value for another, imposing no liability on either side. If, said Gibson, Ch. J., in *Bayard v. Shunk*, 1 Watts & Sergeant, 92, the securities are transferred for a debt contracted at the time, the presumption is that they are received in satisfaction of it, but if for a precedent debt, it is that they are received as a collateral security for it, and in either case it may be rebutted by direct or circumstantial evidence.

It was said in like manner in *Noel v. Murray*, 4 Duer, 35, 3 Kernan, 167, that when the sale and delivery are simultaneous acts, there is no precedent debt, and the case comes within the rule, that a vendor who receives the note of a third person for goods sold at the time, will be presumed to have taken it in payment. The doctrine as thus stated is sustained by the general current of decision in England and the United States. *Saffee v. Gallagher*, 3 E. D. Smith, 507; *Ferdon v. Jones*, 2 Id.

106; *McIntyre v. Kennedy*, 5 Casey, 448, 451, 453; *Burd v. Cook*, 15 Johnson, 241; *The Union Bank v. Smiser*, 1 Sneed, 501, 514; *Bicknell v. Waterman*, 5 Rhode Island, 43; Byles on Bills, 122, 229, 507; *Devlin v. Chamblin*, 6 Minnesota, 468; *Arts v. Leggett*, 16 New York, 582, 590; *Young v. Stahelin*, 34 Id. 258.

It will make no difference in point of principle that the maker of the note was insolvent at the time, if there is no fraud or undue concealment on the part of the purchaser. Such at least is the well established rule in England; Byles on Bills, 122, and the law was so held in *Bicknell v. Waterman*. The same conclusion was reached in *Scruggs v. Gass*, 8 Yerger, 175, although the decision went on the ground that the notes of a corporation chartered by the State as a bank of issue, have an exceptional character, and should be presumed to have been taken as cash unless the contrary is apparent (*ante*, 284).

The rule and its reason were clearly explained by Ames, Ch. J., in *Bicknell v. Waterman*. It was said to be a well known principle, applicable alike to sales and exchanges of things personal, that in the absence of fraud and warranty, neither party was responsible for a deficiency in quality or value. Applying this principle to the transfer of a note by delivery or an endorsement without recourse, in payment for goods, it was obvious that the purchaser was responsible for the past or future insolvency of the maker, unless he was guilty of fraud in passing that as valuable which he knew to be worthless. A forged note stood on a different ground, because the assignment of a chose in action is an implied warranty of the signature of the debtor, and that the obligation is really due (*ante*, 287). If decisions might be found tending the other way, they were contrary to the main current of authority in the United States and England. Byles on Bills, 122, 125, 307. There was undoubtedly a preliminary question whether the contract was by way of sale or exchange, or, in the case of a precedent debt, whether the note was taken as conditional or absolute payment. If, however, this was solved satisfactorily by the jury, or in the case stated submitted to the court, the conclusion would be a matter of law. *Wheeler v. Schroeder*, 4 Rhode Island, 383, 392.

It results from what was said in this instance, and in *Bayard v. Shunk*, that while the onus is, under such circumstances, on the vendor to show that the instrument was not received in payment, *Noel v. Murray*, 3 Kernan, 167, 172; it will still be open to him to prove that the intention of the parties was that the purchaser should be personally answerable for the price if the note proved unavailable. *Gibson v. Toby*, 53 Barb. 191; *Darnell v. Morehouse*, 36 Howard Practice R. 511. In the language of Ch. J. Savage, in *Lightbody v. The Ontario Bank*, 11 Wend. 9, the cases turn upon "the agreement or understanding of the parties at the time," and not upon a rigid or inflexible rule of law.

*Mooring v. The Maine Dock and M. Ins. Co.*, 27 Alabama, 254. It is accordingly well settled that when the intention, as disclosed by the evidence, is that the note should not be at the risk of the vendor, he may fall back on the consideration if it is dishonored. *Johnson v. Reed*, 9 Johnson, 310; *Alcock v. Hopkins*, 6 Cushing, 484. In *Alcock v. Hopkins*, goods were ordered by a dealer in Boston, from the manufacturers in England, payable at four months, by draft on Coates & Co., of London. The plaintiffs sent the goods and drew on Coates & Co. for the amount, who accepted the bills but failed before presentment. The plaintiffs then brought suit for the price. The court held that the question whether the acceptance was conditional or absolute payment, was one of fact for the jury, and refused to disturb the verdict which had been rendered for the plaintiffs. The case of *Youngs v. Stahelin*, 36 New York, 128, affords an analogous instance.

It results from these decisions that when the transaction, instead of being an exchange of the goods for the note, is a sale for a sum certain, with an express or implied understanding that the note of a third person shall be given for the price, the payment will be conditional, not absolute, and the vendor may recover on the common counts on proving that the instrument was presented for payment and acceptance and dishonored. *Darnell v. Morehouse*, 36 Howard Practice R. 511; *Gibson v. Toby*, 53 Barb. 191; *Lightbody v. The Ontario Bank*, 11 Id. 915; *Alcock v. Hopkins*, 6 Cushing, 484, 489; *Gardner v. Gorham*, 1 Douglass, Michigan, 507; *Devlin v. Chamblin*, 6 Minnesota, 468; *Mooring v. The Maine Dock and M. Ins. Co.*, 27 Alabama, 254; *Ex parte Blackburn*, 10 Vesey, 204; *Hickling v. Hardy*, 7 Taunt. 313; *Brown v. Keuchy*, 2 Bos. & Pul. 318; *Wright v. The First Crockerly Ware Co.*, 1 New Hampshire, 281; *Jones v. Savage*, 6 Wend. 658; *Monroe v. Hoff*, 5 Denio, 369. In *Ex parte Blackburn*, Lord Eldon said, that in a sale of goods the law implied a contract that those goods should be paid for. It was competent for the parties to agree that the payment should be by a particular bill. In the case under consideration, it would be extremely difficult to persuade a jury that an agreement to pay by bills was satisfied by giving bills whether good or bad. The bills were only a mode of payment, and if they were dishonored the debt arising out of the contract for goods sold and delivered, remained.

The presumption that such a payment is absolute may be rebutted by facts and circumstances indicating a contrary intent. *Bayard v. Shunk*, 1 W. & S. 92, 95; *Monroe v. Huff*, 5 Denio, 369. In *Monroe v. Huff*, the guarantee of the purchaser was held to show that the bill was not to be taken absolutely; and that a suit would lie for goods sold and delivered, if it was not paid. And where the vendor took the note of a third person and gave a receipt in full, but remarked that it should have been endorsed by the purchaser, to which the latter replied

that it made no difference, the court said that the question was one of fact for the jury, and refused to disturb the verdict which had been found for the plaintiffs. *Johnson v. Weed*, 9 Johnson, 310. In *Gibson v. Toby*, 53 Barb. 191, the presumption of payment was in like manner held to be rebutted by the assurance of the purchaser that the draft was as "good to the vendor as the money, or better." And although when a similar question arose in *Whitbeck v. Van Ness*, 11 Johnson, 409, the court set aside a verdict which had been rendered for the vendor, it was because the testimony indicated that the transaction was an exchange, and that the instrument was to be at the risk of the party who received it. *Lightbody v. The Ontario Bank*, 11 Wend. 9, 17.

The language held in some of the decisions might convey the idea, that there is no presumption for or against satisfaction, whether the note is given for a consideration passing at the time or antecedently, and that each case should be judged by its own circumstances without regard to general rules. See *The Ontario Bank v. Lightbody*, 11 Wend. 915; *Darnell v. Morehouse*, 36 Howard Practice R. 511, 522; *Monroe v. Hoff*, 5 Denio, 360, 362; *Bicknell v. Waterman*, 5 R. I. 43, 49. In *Monroe v. Hoff*, Whittlesey, J., said that the doctrine now was that a note taken either for an antecedent debt or for goods sold at the time, is not payment unless it is so agreed, and in either case the inquiry should consequently be whether the vendor or creditor agreed to take the instrument in payment; and a dictum to the same effect may be found in *Porter v. Talcott*, 1 Cowen, 383. Speaking generally, this is no doubt true; but the difficulty is to know what inference should be drawn when the agreement is not proved, and all that appears is the delivery of the goods by one party and the transfer of the note by the other. This question did not arise in *Porter v. Talcott*, or *Monroe v. Hoff*, because the presumption that the purchaser was not to be answerable on the dishonor of the instrument was repelled by the evidence, which showed in the one case that he had guaranteed the payment of the note, and in the other that the maker was his agent. And the weight of authority is clearly that where a note or bill is given without endorsement for goods sold at the time, the transaction is *prima facie* an exchange of one form of value for another, and any loss arising from the insolvency of the maker or acceptor must be borne by the vendor. *Bicknell v. Waterman*, 5 R. I. 43; Byles on Bills, 123, 229. It will make no difference in the application of this principle that the price is fixed or computed in money, if the seller consents at or before delivery to take the note of a third person in full or as a partial payment. Under these circumstances the question may still be one of fact; but in the absence of countervailing evidence the jury should not be permitted to find that the payment is less than absolute. *Noel v. Murray*, 1 Duer, 385; 3 Kernan, 167, 172 (ante); *The Union Bank*

v. *Smiser*, 1 Sneed, 501, 514; *Breed v. Cock*, 15 Johnson, 241; *Whitbeck v. Van Ness*, 11 Johnson, 409; *Soffee v. Gallagher*, 3 E. D. Smith, 507; *Roberts v. Fisher*, 53 Barb. 69.

The distinction between giving a note for a pre-existing obligation and a consideration passing at the time, is not, however, that the instrument has an effect as satisfaction in one case, which is denied to it in the other, but that in the latter case the note is a fulfilment of the contract, and there is no debt to satisfy. If it appears through any sufficient means of proof that the sale was for money and the note taken as a security for the amount due, the payment will be conditional, not absolute. *Wheeler v. Schroeder*, 4 Rhode Island, 383, 389; *Gibson v. Roby*, 53 Barb. 191, 196; *Darnell v. Morehouse*, 36 Howard Practice R. 511, 521.

In *Wheeler v. Schroeder*, the contract was to do work and furnish materials for the erection of a building, "payable in six months' satisfactory paper." The owner of the building gave his own note without an endorser for one-half the amount due, and the acceptance of a third person for the balance, and took a receipt in full. The court said that the presumption that the paper was to be taken in exchange or as a satisfaction, was repelled as to half of the debt, and therefore as to all, and that the payment was conditional and did not divest the lien which the contractor had filed under the statute.

It has been said in like manner, that the presumption that the sale was exclusively on the credit of the note, does not arise when it is drawn, endorsed or guaranteed by the purchaser, and that the vendor may recover in *indebitatus assumpsit* for goods sold and delivered if the instrument is dishonored. *Darnell v. Morehouse*, 36 Howard Practice R. 511, 528; *Monroe v. Huff*, 5 Denio, 369; *Butler v. Haight*, 8 Wend. 535; *Derlin v. Chamblin*, 6 Minnesota, 468; see *Whitbeck v. Van Ness*, 11 Johnson, 409. *Franklin v. Etzell*, 1 Sneed, 497, 514; *Torrey v. Hadley*, 27 Barb. 192, 195; *Whitney v. Goen*, 20 New Hampshire, 354. In *Buller v. Haight*, Sutherland, J., said the guaranty was conclusive evidence that the notes were to be at the risk of the purchaser. They did not, therefore, discharge the cause of action arising from the sale. Taking the transaction as a whole, it was obvious that the defendant was to be personally liable for the price if the notes were not paid. The same principle was applied in *Monroe v. Huff*, although the guaranty was invalid under the statute of frauds.

The better opinion would, however, seem to be that if the endorsement of a note or bill given for a contemporaneous purchase, is a good ground of recovery against the vendor on due proof of demand and notice, in accordance with the rules of the mercantile law, it is not a reason for holding him accountable in an action for goods sold and delivered. See *Smith v. Mercer*, 3 Excheq. L. R. 511; *Soffee v. Gallagher*, 3 E. D. Smith, 514.

An express conditional promise negatives rather than establishes the existence of an implied promise founded on the same consideration. *Mussen v. Price*, 4 East, 147; *Allen v. Ford*, 19 Pick, 217. In *Soffee v. Gallagher*, the court said, that taking the note of the purchaser for goods sold at the time, was not satisfaction, and if the instrument was dishonored, an action would confessedly lie against him for the price. The case was substantially the same when the note of a third person was given in payment, and guaranteed by the purchaser. Under these circumstances his obligation became absolute on the dishonor of the note, and the question whether the action should be brought on the guaranty or for goods sold and delivered was one of form. Agreeably to the decisions in New York, the guaranty was strong if not conclusive evidence, that the sale was on his credit. When, however, the terms of the contract were that payment should be made in the note of a third person endorsed by the purchaser, he did not come under an engagement to pay for the goods, but merely to pay the note on being duly notified that it had been dishonored. His undertaking was, therefore, not absolute as a buyer, but conditional as an endorser, and he could be made liable in any form of action without proof that the instrument was presented, and due notice given that it was not paid.

It was said, in like manner, in *Jones v. Savage*, 6 Wend. 662, that when a merchant buys goods and pays for them in a note of a third person, which he endorses, if the vendor of the goods neglects to demand the note, and give notice to the endorser so as to charge him, he has made the note his own, and must rely upon the solvency of the maker. He cannot sue the endorser as such, because the endorser is discharged by the negligence of the holder. He cannot sue for the goods, because he received payment in a note.

All the authorities, however, agree that payment in the unaccepted check or draft of the purchaser is conditional not absolute, and that if the instrument is dishonored, the vendor may sue on the consideration unless he has been guilty of negligence. *Mussen v. Price*, 4 East 147, 151. *Hickling v. Hardy*, 7 Taunton, 513.

It has been held in several instances, that when an agreement is made to sell and take payment in the notes of a third person, who becomes insolvent before the agreement is carried into execution on either side there is a failure of consideration, and the vendor may refuse to deliver the goods. *Owenston v. Morse*, 7 Term, 64; *Roget v. Merritt*, 2 Caines, 117. In *Roget v. Merritt*, the plaintiff inquired through a broker whether the defendants would sell two hundred and twenty barrels of flour for the note of one Joseph Lyon. The defendants agreed to this proposition, and a memorandum of the contract was drawn up and signed by them. It was also stipulated that the defendants should pay the difference between the note and the amount due for the flour in cash. Lyon failed

soon afterwards, and when the note was tendered, the defendants declined to receive it or deliver the flour. The plaintiff then brought assumpsit for this breach. Hamilton, *arguendo*, contended that the transaction was clearly an exchange. When such an agreement is so far completed that nothing remains to be done but delivery, the right of property passes, and if a loss occurs, *res perit domino*. A note was to be given for the flour, not money to be paid, and if the note proved to be bad the vendor must take the consequences.

The court, however, said that the contract was executory, and so declared on; and before the period for the execution of it arrived, the consideration wholly failed through the insolvency of Lyon. An offer to pay in the note of a bankrupt was not an offer of payment. It was established under *Owenson v. Morse* that upon an agreement to accept notes in payment, which turned out to be bad, a tender of the notes would not be valid unless it was part of the agreement to take them absolutely, and run the risk of the insolvency of the maker.

The law was held the same way in the case of *Benedict v. Field*, 16 New York, 595, which was a sale of fifty casks of bleaching powders, to arrive by the ship Emma Field, payable in the note of Leggett Bros. without recourse, at the market price ruling at the time of delivery. Leggett Bros. failed before the arrival of the vessel, and the vendor refused to receive the note or deliver the goods. The defendant, said Comstock, C. J., in delivering the opinion of the court "was not bound to part with his property and accept in payment the notes of an insolvent firm, such insolvency having occurred, or at least having been ascertained, after the sale and before the time of delivery. If the goods had been delivered without any qualification before the insolvency had happened or become known, then it is clear that the vendor could have, under and upon the contract, no other remedy for the price than to accept the note. (*Des Arts v. Leggett*, ante, 582.) But it is a very different question whether he was bound to perform the contract and deliver the goods after the firm whose notes were to be accepted had failed. The agreement was executory, as we have said, in respect to title, it certainly was in respect to the delivery, and before the time for performance arrived, the essential consideration on which it was based had failed. It is true that the sale, looking only at the precise letter of the contract, was not defeasible in the event which occurred. But when the parties contracted, the firm of Leggett Bros. was in good credit, and was supposed to be solvent. Their notes were to be accepted as payment, but the ability of that firm to give good notes was assumed, and was really the consideration of the defendant's engagements to sell and deliver the goods."

"The analogies to be derived from the law of stoppage in transitu are perhaps not perfect, but they are, I think, sufficiently near to



furnish a rule for the present case. Where goods are sold to be paid for in the notes of the buyer, and he becomes insolvent before the delivery is complete, the seller may arrest the delivery and rescind the sale. Such is the right of the seller, although in such cases the title to the goods has passed by the sale, and they are placed at the buyer's risk by being put in transit. But this is a right which violates the mere forms of the sale. There is nowhere in the terms of the contract any such condition. The law implies it, because the assumed ability of the buyer to pay for goods was the inducement to the sale. The principles involved in this branch of the law, it seems to me, carry us somewhat farther than it is necessary to go in order to exonerate the seller from his contract, where he is to accept the obligations of a third person, and the insolvency occurs before the goods are put in transit, and while the contract remains strictly executory."

These cases are directly at variance with *Bicknell v. Waterman*, 5 Rhode Island, 29 (ante), but they are sustained by the authority of Lord Kenyon, in *Owenson v. Morse*, and appeal strongly to natural equity. It is not easy to resist the argument of Hamilton, as developed by Ch. J. Ames, that such a transaction is an exchange which throws the risk of the note on the seller. A vendor who sells on the credit, or for the note of the buyer, may however on learning the insolvency of the latter retain the goods or stop them in transitu, 1 Smith's Leading Cases, 6 Am. ed., 1099, and it would seem that a sale for the note of a third person is within the scope of this equity. Whether A. sells to B. in consideration of B.'s promise to pay in three months, in consideration of a promise to that effect by C., or in consideration of C.'s promissory note the case is substantially the same, and should be governed by the same principle. The law was so held in *Owenson v. Morse*, and courts should be slow to disturb precedents which are on the side of justice. The opposite doctrine may encourage unfair dealing by inducing men to exchange securities which they know to be worthless, for valuable commodities, in the hope that the injured party will not be able to demonstrate the fraud with the certainty required by the rules of evidence. The weight of authority however seems to be that where, a contract to take the note of a third person absolutely in payment is executed by the delivery of the instrument, the vendor cannot rely on the insolvency of the maker as a reason for withholding the goods, or stopping them in transitu. *Long v. Spruill*, 9 Jones, 96; *Eaton v. Cook*, 32 Vermont, 58.

It is not always easy to determine whether the note is given for a precedent debt or in the execution of a contemporaneous contract. In *Noel v. Murray*, 1 Duer, 385, 3 Kernan, 167, the defendant ordered two looking glass plates on the 8th of October, from the plaintiffs, which were subsequently framed by a third person at the plaintiffs'

store under the direction of the defendant, and finally delivered on the 12th of the same month. The defendant paid for the looking glasses on delivery by giving the note of Howard & Sons for \$988.67, and the balance, \$38.23 in cash, and took a receipt in full. The note having been dishonored an action was brought for goods sold and delivered. The question was left to the jury who found for the defendant. The court held that to constitute a sale the terms of payment must be agreed on between the parties. This was not done until the 12th of October, when the looking glasses were delivered, and the note received in payment. There was, consequently, no precedent debt, and the case came under the rule that when the note of a third person is given contemporaneously with the sale, the presumption is that it is taken in satisfaction. Where, however, goods were sold to be paid for within ten days in cash, or by approved banker's bills not exceeding three months from date, and the purchaser subsequently gave a banker's bill in payment without endorsing it, which was received without objection, but subsequently dishonored and a suit brought for the price, the court seem to have thought that the payment was conditional, but held that the liability of the defendant could not be greater than if he had endorsed the bill, when the failure of the plaintiff to give immediate notice would have been an insuperable bar. Bramwell, Baron, said, that either the bill was taken for better or for worse, in which case the defendants were not liable at all, or it was taken with the same right of recourse as if it had been endorsed, in which event the defendants were freed from liability by the want of notice. *Smith v. Mercer*, 3 Excheq. L. R. 51.

It is clear, on authority and principle, that when a pecuniary obligation has once accrued, it will not be discharged by taking a note or bill, without an agreement to that effect, which must be shown by the purchaser. Whether the interval between the delivery of the goods and the transfer of the instrument is an hour, a month or a year, the case will still be within the rule that such a payment is conditional, to fail if the note be dishonored. *Darnall v. Morehouse*, 36 Howard Practice R. 511; *Gibson v. Toby*, 53 Barb. 191; *Camidge v. Allenby*, 6 B. & C. 363 (ante, 122). In *Darnall v. Morehouse*, cattle were sold in Buffalo at 9 A. M., for a price agreed on between the parties. The buyer drove them away, telling the vendor that he would return and settle with him. He came back at ten o'clock, and tendered the draft of a third person on a banking house in New York, which was taken in payment. The draft was dishonored when presented, and the court held that the debt revived, and might be recovered in a suit for goods sold and delivered. The principle was applied under analogous circumstances in *Gibson v. Toby*, and it is sustained by the language held in *Camidge v. Allenby*.

A sale for a bill or note payable at a future day, is a sale on credit, and if the instrument is withheld, the purchaser cannot maintain

*indebitatus assumpsit* for the price, but must wait until the note would have matured, or declare specially for the injury occasioned by the non-delivery. *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 Bos. & Pul. 582; *Campbell v. Sewell*, 1 Chitty, 609; *Ferguson v. Carrington*, 9 B. & C. 59; *Helps v. Winterbottom*, 2 B. & Ad. 431; *Allen v. Ford*, 19 Pick. 207; *Martin v. Fuller*, 16 Vermont, 108; *Scott v. Montague*, Ib. 164; *Eddy v. Stafford*, 18 Id. 235. For as a note payable at a future day operates to suspend or postpone the right of action, so no other inference can be drawn from an agreement to take such an instrument in payment. *Wheeler v. Schroeder*, 4 Rhode Island, 383.

The rule was laid down by the majority of the King's Bench in *Mussen v. Price*, in opposition to the opinion of Lord Ellenborough, and has since been established on this basis. It is irrespective of the nature of the consideration, and was applied in *Wheeler v. Schroeder*, 4 Rhode Island, 383, to a contract for labor and materials "payable in six months' satisfactory paper." "Notwithstanding," said Ames, C. J., in *Wheeler v. Schroeder*, "the non-delivery of the stipulated paper on time, the right to sue for the price of goods sold or services rendered upon such an agreed credit, is suspended until the time is reached at which the paper would have come to maturity if delivered, the present remedy of the creditor being confined to a special action of *assumpsit* for the non-delivery of the paper." Or to use the language of Lord Ellenborough in *Hoskins v. Duperoy*, 9 East, 500, "it is settled by the cases of *Mussen v. Price*, 4 East, 147, and *Dutton v. Solomonson*, 3 Bos. & Pul. 582, that where goods are sold upon a certain credit, to be paid for by a bill at a future day, the vendor cannot maintain an action for the goods sold, until the time arrives at which the bill would become due, because by the contract the goods are not to be paid for till that time."

It results from what has been said, that such a demand is not "*debitum in presenti*," nor could it be made the foundation of a commission of bankruptcy under the 31 Geo. 1, C. 31, and 5 Geo. 2, C. 30. This distinction is, however, to a great extent, merely formal; *Dutton v. Solomonson*, 3 Bos. & Pul. 583; *Brown v. Foster*, 1 P. F. Smith, 165, 173; *Girard v. Taggart*, 5 St. R. 19, 543; and the vendor may recover the full price of the goods in an action brought for the breach arising from the failure to give the note; *Girard v. Taggart*, 5 S. & R. 19, 543; *Rhinehart v. Olwaine*, 5 W. & S. 157; *Hanna v. Mills*, 21 Wend. 90; *Yale v. Coddington*, Ib. 175; *Wheeler v. Schroeder*; and a recovery in such a suit will be a bar to a subsequent action of *indebitatus assumpsit* for goods sold and delivered. *Girard v. Taggart*.

In *Mussen v. Price*, where the vendor was to pay for the goods in three months, by a bill at two months, the court held that the sale was on

a credit of five months, and that assumpsit for goods sold and delivered could not be brought at the end of three months, upon the failure of the vendee to give the bill. Grose, J., said, that there was an express contract, fixing the terms on which one party was to buy and the other to sell. This left no opening for an implied assumpsit. The action consequently should have been brought for not giving the bill in pursuance of the agreement, and not for goods sold and delivered. It was said, in like manner, in *Girard v. Taggart*, 5 S. & S. 19, 32, that the law will not imply an assumption against an express agreement, and that if the vendor waits until the expiration of the credit, he may sue for goods sold and delivered, but not before.

When, however, the question arose in *Brown v. Foster*, 1 P. F. Smith, 165, under a contract to do work for a specific sum one-half payable in promissory notes at three and six months, these decisions were set aside. Strong, J., said that the privilege of paying in notes was for the benefit of the defendant; and it was therefore one which he might waive at pleasure. To take advantage of it he should have given the notes when the work was finished. It was only on this condition that he could escape the obligation to make immediate payment in money. Properly interpreted, the agreement was not for a credit, but that the defendant should have an option to pay in money on the completion of the work, or in notes at six months. And if he did not give the notes at the time prescribed, he would be presumed to have elected to pay the money, which might be sued for at once and recovered.

It is well settled that when the goods are paid for by the check or draft of the purchaser, *indebitatus assumpsit* will lie immediately on the dishonor of the instrument, although by a refusal to accept before the period at which it would have reached maturity. *Brooke v. White*, 2 New R. 330; *Hickling v. Harding*, 7 Taunton, 313; *Mussen v. Price*, 4 East, 147, 151. In *Mussen v. Price*, Lord Ellenborough said, that it was a common experience that if the vendor gave in payment a bill drawn on another, which was presented and dishonored, the vendor might sue at once for the price. But, however true this may be, where the payment is conditional, it does not apply where the note of a third person is given absolutely in exchange for goods. Under these circumstances the liability of the buyer is at an end on the delivery of the note, and the dishonor of the instrument will not render that a debt which was not such in the first instance. *Dutton v. Solomonson*; *Saffee v. Gallagher*, 5 Rhode Island, 43, 52; *Saffee v. Gallagher*, 3 E. D. Smith, 407; *Reed v. Cock*, 15 Johnson, 241; *Ellis v. Wild*, 6 Mass. 321; *Dutton v. Solomonson*, 3 B. & P. 583. A contract of barter is not converted into a contract to pay in money by a failure to comply with the terms of the contract. *Harrison v. Luke*, 14 M. & W. 139. When, on the other hand the sale is for money, and would

give rise to immediate pecuniary obligation were it not for a collateral stipulation that the purchaser may give a note or bill in payment, a failure to give the instrument may, as Lord Ellenborough intimated in *Mussen v. Price*, be regarded as a breach of the condition, entitling the vendor to sue at once for the price. *Brown v. Foster*, 1 P. F. Smith, 165. The case of a sale on credit, with a distinct agreement that the purchase money shall not be payable till a future day, and shall in the meantime be secured by a note, seems to be an intermediate one, and if the security is withheld, the declaration must, agreeably to *Mussen v. Price*, be special, and a recovery cannot be had on the common counts.

In taking leave of the subject it may be observed, that the question whether any such transaction is a sale in the ordinary sense of the word, or an exchange, is one of fact, depending on the intention of the parties. *Wheeler v. Schroeder*, 4 Rhode Island, 383. No general rule can be laid down that will hold good under all circumstances. *Bicknell v. Waterman*, 5 Rhode Island, 43. That a purchaser has an election to pay in goods, will not preclude the vendor from suing for the money if the goods are not delivered. And this is equally true of a stipulation that he may pay in a note or bill. *Foster v. Brown*, 1 P. F. Smith, 165. This argument ceases to be applicable when the contract is executed by the delivery of the instrument. But there is another consideration. When the price is fixed in money at the time of the sale, the natural presumption is that it is to be paid; *Ex parte Blackburn*, 10 Vesey, 204; and this inference is not necessarily rebutted by taking the note of a third person, because the payment may be conditional to fail if the instrument is dishonored. *Wheeler v. Schroeder*, 4 Rhode Island, 383.

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#### ACCEPTANCE OF BILLS.

#### COOLIDGE ET AL. v. PAYSON ET AL.

In the Supreme Court of the United States.

FEBRUARY TERM, 1817.

[REPORTED, 2 WHEATON, 66-75.]

*A letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on credit of the letter, a virtual acceptance, binding the person who makes the promise.*

THIS cause was argued by Mr. *Swann*, for the plaintiff in error, and by Mr. *Winder*, for the defendant.

*Feb.* 21. Mr. Chief Justice MARSHALL, delivered the opinion of the court.

This suit was instituted by Payson & Co., as endorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co. as acceptors.

At the trial, the holders of the bill, on which the name of John Randall was endorsed, offered, for the purpose of proving the endorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill going to the jury without further proof of the endorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the endorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the *Hiram*, claimed by Cornthwaite & Cary, which had been captured and libelled as lawful prize. The cargo had been acquitted in the District and Circuit Courts, but from the sentence of acquittal, the captors had appealed to this court. Pending the appeal, Cornthwaite & Cary transmitted to Coolidge & Co. a bond of indemnity, executed in Baltimore with scrolls, in the place of seals, and drew on them for two thousand seven hundred dollars. This bill was also payable to the order of Randall, and endorsed by him to Payson & Co. It was presented to Coolidge & Co., and protested for non-acceptance. After its protest Coolidge & Co. wrote to Cornthwaite and Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say, "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your State. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W.

feels satisfied on this point, he will inform you, and in that case your draft for two thousand dollars will be honored."

On the same day Coolidge & Co. addressed a letter to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say, "You know the object of the bond, and, of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?"

In his answer to this letter, Williams says, "I am assured, that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary, called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter-book the letter he had written.

Two days after this, the bill in the declaration mentioned, was drawn by Cornthwaite & Cary, and paid to Payson & Co., in part of the protested bill of 2,700 dollars, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict; but the Court instructed the jury that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from

Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action; and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declaration aforesaid, did exceed the private instructions given to him by Coolidge & Co., in their letter to him.

To this charge, the defendants excepted; a verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite & Cary, contains no reference to their letter to Williams which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, to know that Williams was satisfied with the execution of the bond and sufficiency of the obligors, and had informed Coolidge and Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans & Rose v. Van Mierop & Hopkins* (3 Burr. 1663), the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the court of king's bench (all the judges being present and concurring in opinion), considered the promise to accept as an acceptance.

Between this case and that under consideration of the court, no essential distinction is perceived. But it is contended, that



the authority of the case of Pillans & Rose v. Van Mierop & Hopkins is impaired by subsequent decisions.

In the case of Pierson v. Dunlop et al. (Cowp. 571), the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord Mansfield, in delivering his opinion, contradict those laid down in Pillans & Rose v. Van Mierop & Hopkins. His Lordship observes, "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance unless accompanied with circumstances which may induce a third person to take the bill by endorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of Pillans & Rose v. Van Mierop & Hopkins had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of Pierson v. Dunlop certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the drawer, in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Lord Mansfield alludes, must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," &c. This answer must be "*accompanied* with circumstances;" but it is not said the answer must contain those circumstances. In the case of Pierson v. Dunlop, the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill, and if it be

shown, an absolute promise to accept will give all the credit to the bill, which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of *Mason v. Hunt* (Doug. 296), Lord Mansfield said, "there is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is that "the drawer or any other person may show upon the exchange?" It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself when shown gives the credit; and the merchant who makes is bound by it.

The cases cited from Cowper and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans v. Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance, that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson and another v. Collins* (1 East, 98), Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed, that the judgment given in that case would, even in England, change the law as previously established. In the case of *Johnston v. Collins*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the endorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended, that this naked promise amounted to an acceptance; but the court deter-

mined otherwise. In giving his opinion, Le Blanc, J., lays down the rule, in the words used by Lord Mansfield, in the case of *Piereson v. Dunlop*; and Lord Kenyon said, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clark and others v. Cock* (4 East, 57), the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true in the case of *Clark v. Cock*, the bill was made before the promise was given, and the judges in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in *Pillans & Rose v. Van Mierop & Hopkins*, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of an opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed, with costs.

Judgment affirmed.

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It has never been doubted since the decision in *Wilkinson v. Lutwidge*, 1 Strange, 648, that the acceptance of a bill of exchange need not appear upon the instrument itself, but may as well be by a separate writing or declaration, addressed to any of the parties in interest. In that case, the bill on which suit was brought, had been enclosed by mail

to the drawee, who wrote in reply promising to pay it in case certain other parties did not, which was held sufficient to render him liable as acceptor. In *Lumley v. Palmer*, 2 Strange, 1000, it was subsequently determined, that a writing is not necessary, and that the drawee will be bound by an oral declaration or admission that the bill is or will be accepted. In the subsequent case of *Powell v. Monier*, 1 Atkins, 611, where a collateral promise by letter to accept was again held valid, Lord Hardwick, observed that the validity of a parol or unwritten acceptance, had been put beyond question by the decision of the King's bench in *Lumley v. Palmer*; and this is now the well established doctrine in England and the United States, even where the bill is given for a debt due by the drawer or endorser, because negotiable instruments are not within the statute of frauds, and the parties to them stand in such a relation to each other that a consideration moving from any one, is sufficient to render the contract binding on all. *Fairlee v. Herring*, 3 Bingham, 625; *Spaulding v. Andrews*, 12 Wright, 411; *Steeleman v. Harrison*, 6 Id. 49, 53; *Edson v. Fuller*, 2 Foster, 183; *Walker v. Side*, 1 Richardson, 249; *Williams v. Winans*, 2 Green, 339, 341; *Mason v. Dousay*, 35 Illinois, 424; *The Ontario Bank v. Worthington*, 12 Wend. 593; *Bank of Michigan v. Ely*, 17 Id. 501; *Arnold v. Sprague*, 34 Vermont, 402; *Lemon v. Box*, 20 Texas, 329. This is an exception to the general rule of the commercial law, under which no one can be liable as a party to a note or bill, unless his signature, or that of some one authorized to represent him, appears on the instrument or on a paper annexed to it and known as "allonge." *Watson v. McLaren*, 19 Wend. 557; 26 Id. 425, 430 (ante, 229).

It is equally well settled, that if the meaning is plain, any form of words will be sufficient, and the drawee may be as much bound by an oral or collateral promise "to settle," or that the instrument shall have "due honor" as if he had written "accepted" across the bill, and authenticated it by his signature. *Fairlee v. Herring*; *Edson v. Fuller*; *Spaulding v. Andrews*; *Clark v. Cock*, 4 East. 57, 69; *Wynne v. Raikes*, 5 Id. 520; *Storer v. Logan*, 9 Massachusetts, 60; *Wills v. Bingham*, 6 Cushing, 6. It has accordingly been held in numerous instances, that a promise to accept an existing bill, or any declaration manifesting an intention to comply with the request of the drawer and operating as a promise by implication, will take effect as an acceptance not only in favor of the person to whom it is addressed, but of prior and subsequent holders, and whether the bill was or was not taken on the faith of the promise. *Clark v. Cock*, 4 East. 57, *Ex parte Dyer*, 6 Vesey, 9; *Wynne v. Raikes*, 5 East. 514; *Harvey v. Martin*, 1 Campbell, 428; *Jeune v. Ward*, 1 B. & Ald. 633; *Billings v. Devaux*, 3 M. & G. 565. *Jones v. The Bank of Iowa*, 34 Illinois, 313.

In *Clark v. Cock*, 4 East. 57, a letter promising that the bill should

have due honor, was held to be an actual acceptance, which could not be rescinded on the ground of failure of consideration after the instrument had been discounted by a third person on the faith of the letter; Lord Ellenborough saying, that it had been laid down in so many cases that a promise to honor a bill, amounted to an acceptance without sending it for a formal acceptance in writing, that it would be a waste of words to refer to the authorities. In this instance the instrument was negotiated after the letter was written, and it was not necessary to decide whether the defendant would have been liable if the plaintiff had been ignorant of the promise at the time of taking the bill. But in *Wynne v. Raikes*, 5 East. 514, the promise was made after the negotiation and dishonor of the bill, and the court held on the authority of *Powell v. Monier*, that a promise to accept was equally valid whether it occurred before or after the transfer of the bill, and whether it did or did not influence the conduct of the endorsee. "A promise to accept an existing bill," said Lord Ellenborough, "is an acceptance. A promise to pay it is also an acceptance. A promise therefore to do the one or the other, *i. e.*, to accept or certainly pay, cannot be less than an acceptance. It amounts, I think, in effect to this, 'Whether we shall send for the bill again, and accept it in form or not, is uncertain, but at any rate, you may depend upon its being paid.' Supposing it to be an acceptance, the time when it is to be considered as made, namely, whether at the date of the letter, or at the time when it reached the drawer to whom it was written in America, (which was on the 19th of March, 1802, after the bill had become due,) is immaterial, inasmuch as an acceptance after the time appointed for the payment of a bill is good, *Jackson v. Piggott*, 1 Ld. Raym. 364, Salk. 127, and *Mulford v. Walcot*, 1 Ld. Raym. 574, Salk. 129, &c.

"The second question in this case is, whether, inasmuch as the bill was not taken by the holders upon the credit of this promise of the defendants so made to the drawers, nor was the same known to them to have been made at all, till after the bill was due, they, the holders, can avail themselves of it as an acceptance? In the case of *Powell v. Monier*, already mentioned, that which was holden an acceptance enuring to the benefit of the endorsee, the plaintiff, was an acceptance contained in a letter to the drawer, one Newburgh, promising 'that his bill should be duly honored;' which promise, being long subsequent to the time when the plaintiffs in that case became possessed of the bill by endorsement, could of course have formed no part of their original inducement to take it. And the promise was in that case, as well as in this, made to a drawer, who had drawn without having any effects in the acceptor's hands; and it does not appear in the one case more than in the other, that the holders, the plaintiffs, ever knew of the acceptance on which they afterwards relied, prior to the time when the bill became

due. Without oversetting the case of *Powell v. Monier*, we cannot say that the plaintiffs are not in the present case, which so entirely resembles it, entitled to recover."

The same question arose in *Billings v. Devaux*, 3 M. & W. 565, with the additional fact that the letter containing the promise was written in ignorance of the death of the drawer to whom it was addressed, and after the dishonor of the instrument had been completed by a refusal to pay it when presented at maturity by the holder, and the decision was that these circumstances were not, even when coupled with the insolvency of the drawer and the failure of the fund on which the bill was drawn, enough to take the case out of the well-settled principle that a promise to accept given to one party to a bill, will operate as an acceptance in favor of every other, whether he did or did not act on the faith of the promise. The court said that the collateral promise was as much an acceptance as if it had been written on the face of the instrument, and might consequently be enforced by the holder, notwithstanding the death of the drawer before the letter containing the promise was received.

These cases show that the dictum of Lord Mansfield, that if a man agrees to do the formal part, the law looks upon it as already done, is still, where the acceptance of an existing bill is in question, clearly law, notwithstanding the doubt expressed by Lord Kenyon, in *Johnson v. Collings*, 1 East. 98. For, as an acceptance is virtually a promise, a promise may well operate as an acceptance. But it is at the same time obvious, that to constitute an acceptance there must be an intention to contract a present obligation, as distinguished from the mere expression of a hope, willingness, or expectation to be bound on other terms, or at some future day. *Stroecker v. Cooper*, 1 Spear, 349. A promise to pay may, however, be an indirect way of promising to accept, and the question in all cases would seem to be, did the drawee intend to make himself responsible for the payment of the bill? *Hough v. Loring*, 24 Pick, 254. This inquiry was said, in *Hough v. Loring*, to be one of fact, which should be submitted to the jury, and such is, no doubt, the rule in general, unless the acceptance is in writing, or depends on the construction of written documents.

The rule in *Powell v. Monier*, was adopted at an early period in the United States, and it is as well settled here as it is in England, that an oral or collateral promise to accept an existing bill is, unless restrained by statute, as valid as if it were written formally on the face of the instrument. *Williams v. Winans*, 2 Green, 339, 341; *Read v. Marsh*, 5 B. Monroe, 8; *Mason v. Dorsey*, 35 Illinois, 424; *Jones v. Culbertson*, 34 Id. 313; *Spaulding v. Andrews*, 12 Wright, 411; *Steman v. Baker*, Id. 49, 53; *Leonard v. Mason*, 1 Wend. 522; *Hough v. Loring*, 24 Pick, 254; *Ward v. Allen*, 2 Metcalf, 53; *Gennett v. Cunningham*, 14 Maine, 56

*Edson v. Fuller*, 2 Foster, 183; *Stockwell v. Bramble*, 2 Indiana, 419; *Hatcher v. Stalworth*, 3 Cushman, 376; *Fisher v. Beckwith*, 19 Vermont, 31; *The Bank v. Woodruff*, 34 Id. 89, 92; *Arnold v. Sprague*, Ib. 402.

In *Sprague v. Andrews*, the defence was, that if there was a promise to pay the draft, there was no promise to the plaintiff who obtained it after the promise. But this was overruled by the court on the ground that the promise was an acceptance, and good as such, in favor of all the parties to the instrument. "An acceptance, said Strong, J, is a promise to pay to any one who may thereafter become the holder, and the legal effect is the same, whether it be in parol or in writing. Nor does it make any difference when a parol acceptance is given, if it be after the bill is drawn, it enures to the benefit of all parties to the bill. It may be given to the drawer or any other party to the bill after it has been endorsed away, and even after it has become due. It may even be given to a person by whose direction and on whose account the bill was drawn, though he be no party to the bill, and although the bill had been previously endorsed. See Byles on Bills, 147, 148, and cases cited, especially *Fairlee v. Herring*, 3 Bingh. 625. If a bill comes into a man's hands with a parol acceptance, though he does not know of that acceptance, he may avail himself of it afterwards when it comes to his knowledge. If not, then he has not all the advantages previous holders had." This view is sustained by the course of American decision, which establishes that a declaration to any party in interest that a bill is or will be accepted, or any act tantamount to such a declaration, and warranting the belief that it is unnecessary to notify the drawer or endorsers, will be binding in favor of prior as well as subsequent holders, whether they were or were not influenced by it in taking the bill. *Storer v. Logan*, 9 Miss. 56, 60; *Wells v. Brigham*, 6 Cushing, 6; *Williams v. Winans*; *Jones v. Culbertson*.

In *Howard v. Carson*, 3 Harris, 433, it was indeed held that to entitle a third person to enforce a promise of acceptance, when there is a failure of consideration as between the promisor and promisee, he must have given value on the faith of the promise. And as this did not appear with sufficient clearness from the plaintiff's evidence, judgment was rendered for the defendant. The same view was taken in *Lugrue v. Woodruff*, 29 Georgia, 648; and *Overman v. The City Bank*, 1 Vroom, 61; and said to be sustained by the authority of Lord Mansfield. But if this rule prevailed at one period, as the dicta of his Lordship, in *Mason v. Hunt*, and those of LeBlanc, J., in *Johnson v. Collings*, indicate, it was conclusively overruled in *Wynne v. Raikes*, 5 East, 544 (ante, 317), and is not law at the present day, either in the United States or in England; *Spaulding v. Andrews*, 12 Wright, 411. "To hold that the same act will be an acceptance or not, according

to the subsequent contingency of the holder of the bill having notice of it, would, in the language of Baron Parke, in *Archer v. The Bank of Ireland*, 11 M. & W. 383, 396, "introduce a strange anomaly and confusion into the relation of the parties to the bill, the drawee being an acceptor as to some and not as to other endorsees. For if the bill were taken under these circumstances without, and subsequently endorsed with notice of the promise, the endorsee might throw the burden of the debt arbitrarily on the acceptor or endorser, leaving each without remedy against the other."

The promise to accept need not be expressed in words, it being well settled "that any conduct on the part of the drawee by which he intends the holder to understand that he means to accept or pay," or as it has been sometimes, and perhaps more accurately expressed, any act giving credit to the bill, will amount to an acceptance. Byles on Bills, 149; *Williams v. Winans*, 3 Green, 339; *Lannan v. Smith*, 7 Gray, 150; *The Bank v. Woodruff*, 34 Vermont, 89, 92; *Storer v. Logan*, 9 Massachusetts, 56, 60; *Hough v. Loring*, 24 Pick. 254. An extraordinary latitude, said Sewell, J., in *Storer v. Logan*, exists as to the evidence requisite to prove an acceptance which need not be written, and is provable by words, or even acts. Whether the detention or destruction of the bill is such an act has been disputed, and depends on circumstances, *Mason v. Barf*, 2 B. & Ald. 26. In *Jeune v. Ward*, 1 B. & Ald. 653; where the defendant refused to accept the bill when presented, and then destroyed it some time afterwards, the remedy was held by the court, contrary to the opinion of Lord Ellenborough, to be in tort, and not by a suit on the bill. There is, however, little doubt that if the drawee keeps, and for a stronger reason if he destroys the instrument without qualifying or explaining his act by language, the law will presume an acceptance, because his conduct necessarily tends to mislead the holder and induce him to suppose that the instrument will be paid when due, or at some convenient period. *Harvey v. Martin*, 1 Campbell, 425, note; *Hough v. Loring*, 24 Pick. 254.

It has been said that equivocal language will not operate as an acceptance, and this no doubt is the rule when the answer of the drawee is of such a nature, or so ambiguous, that it cannot reasonably be understood as a promise to pay or accept. *Rees v. Warwick*, 2 B. & Ald. 26; *Powell v. Jones*, 1 Espinasse, 19; *Webb v. Mears*, 9 Wright, 222; *Carnegie v. Morrison*, 2 Metcalf, 381; *Walker v. Lide*, 1 Richardson, 249. In *Webb v. Mears*, the defendant who had returned the bills with "acceptance waived" written across their face, in a letter stating that he could not accept them because he was not in funds, but hoped to receive a remittance from the drawer before the drafts fell due, was accordingly held not to be liable as an acceptor. On the other hand, a declaration by one of two drawees that they had the money and the



draft ought to be paid, but that he would not interfere, and the holder must see his partner, was said in *Fairlee v. Herring*, 3 Bing. 625, to be clearly an acceptance when taken in connection with the rest of the evidence, which showed that the defendants had received value from the parties on whose account the bill was drawn, and promised them to pay it when presented. The rule that words susceptible of two interpretations shall be taken most strongly against the party using them, certainly ought to have its full force in the case of a bill of exchange, where ambiguous language may delay a protest or prevent notice of dishonor from being sent in due season; *Hough v. Loring*, 24 Pick. 254; and when the question is in other respects doubtful, much may depend on whether the plaintiff lost or perfected his remedy against the drawer and endorsers.

In *Bentinck v. Dorrien*, 6 East, 199, the plaintiff was held to be precluded from construing the course of the defendant as an acceptance by protesting the instrument as not accepted; but in *Fairlee v. Herring* the court said that if a protest can be a bar in any case, it will not be so where the holder is ignorant of the acceptance when the protest is made.

In the instances hitherto considered, the promise was given to a party to the instrument if not directly to the person who brought the suit, and the better opinion would seem to be that to render a promise to accept valid it must be addressed to a holder of or party to the bill, or to some one who is an agent for such holder or party. *Martin v. Bacon*, 1 Constitutional R. 132; *Grant v. Hunt*, 1 C. B. 41. A declaration to a stranger that the bill would be accepted was accordingly said in *Martin v. Bacon*, not to be an acceptance in the absence of evidence that it was communicated to and influenced the conduct of the endorsee. It is on the other hand well established, that a promise to one of the parties to the bill, or to an agent acting on his behalf will enure for the benefit of all. *Spaulding v. Andrews*, 12 Wright, 411; *Fairlee v. Herring*, 3 Bing. 625. The agency may, however, be implied as well as express, and a stranger to the instrument used as a means of communication with the parties. In *Fairlee v. Herring* an agreement to accept made with a firm for whose benefit, and in the course of whose business the bill was drawn, in consideration of value received from them, was held binding in favor of the payee. A similar decision was made in *Grant v. Hunt*, 1 C. B. 44, and a letter written to a merchant residing in London, promising to accept bills which had been drawn on the writer by the correspondent of the promisee in Genoa for the price of a cargo of wheat purchased on his account, held to be an acceptance which became irrevocable as soon as the letter reached the person to whom it was addressed, and could not be released or waived by him without the consent of the parties to the instrument.

These cases show that if the promisor is a party in interest he need not be a party to the bill; and where the relation of principal and agent exists, a declaration made to either may enure as an acceptance of a bill drawn by the other. In *Billings v. Devaux*, 1 M. & G. 565, a letter addressed to the drawer, after his death, was held to operate as an acceptance in favor of the holder. And there is little doubt that the doctrine that a contract with one man for the benefit of another may be enforced by the latter (ante, 173), is applicable to the acceptance of bills of exchange.

As a promise to accept is binding in favor of all the parties to the instrument, it cannot be rescinded without their consent by an agreement between the promisor and the promisee. *Grant v. Hunt*, 1 C. B. 44; *Clark v. Cock*, 4 East, 57. And this will be true, even when the plaintiff was ignorant of and not influenced by the promise in taking the bill. *Grant v. Hunt*. For as such a promise, though made in terms to one, is virtually a promise to all, all have an interest in its fulfilment and must be consulted before it can be set aside. In like manner, the death of the drawer or other party to the bill will not defeat an acceptance, whether worded generally, or contained in a letter to the deceased. *Billings v. Devaux*, 1 M. & G. 565. It follows from the same principle that a drawee who promises the drawer to accept, in effect contracts with the holder, and must keep his engagement notwithstanding the failure of the consideration on which it was made; *Clark v. Cock*, 4 East, 57; unless there is an entire absence of consideration on the part of the holder and of those under whom he claims. See *Illsley v. Jones*, 12 Gray, 260.

The acceptance of existing bills stands under these decisions as it did in the time of Lord Hardwick, but there has been much doubt, and some fluctuation of opinion on the cognate question, whether a bill can be accepted by anticipation before it is drawn. It was, and still is generally conceded, that a promise to accept a non-existing bill may, if sustained by a consideration be good as between the parties, and render the promisor liable in damages to the promisee; *The Bank of Ireland v. Archer*, 11 M. & W. 383, 389 (ante); but no one seems to have imagined that such a promise could be binding as an acceptance, until the idea was suggested by Lord Mansfield in *Pillans v. Van Mierop*, 3 Burrow, 1663. There the plaintiffs who had advanced money to one White on the faith of a promise on his part to open a credit in their favor with the defendants, wrote, stating that they were about to draw for the amount, and asking whether the defendants would accept the bill. The defendants in reply promised, that the bill should have due honor, but refused to accept or pay the draft when presented, assigning the failure of White, which had occurred in the interval as the cause. Suit having been brought for this breach of

engagement, and on the bill as accepted, it was said on behalf of the defendants that the promise was a nude pact destitute of consideration, and moreover being executory, could not enure as an acceptance. On the other hand, it was contended for the plaintiffs that commercial contracts required no consideration, and that a promise to accept a bill when drawn, should be regarded as an actual acceptance. And this view was to a great extent adopted by the court, who decided the case in favor of the plaintiffs. "This is just the same thing," said Lord Mansfield, "as if White had drawn a bill on the defendants payable to the plaintiffs; when it had been nothing to the latter, whether the defendants had effects of White in their hands or not, if they accepted the bill. And this amounts to the same thing. I will give the bill honor, is in fact accepting it. If a man agrees that he will do the former part, the law looks upon it in the case of the acceptance of a bill, as actually done." And he also expressed the opinion, that as between merchants, and in cases arising under the commercial law, a nude contract deriving its force solely from the assent of the parties, might if reduced to writing be binding on the promisor. But this dictum which was not essential to the determination of the matter in hand, and never became part of the law of England; *Johnson v. Collings*, 1 East, 105; *The Bank of Ireland v. Archer*, 11 M. & W 383, 389; was overruled not long afterwards by Chief Baron Skinner, in delivering the answer of the judges to the questions propounded by the lord chancellor, on behalf of the House of Lords in *Rann v. Hughes*, 7 Term, 350 (note), and the doctrine that every parol contract, whether written or oral, must have a consideration co-extensive with, and capable of sustaining the promise, established on a basis that has not since been disturbed. The exception afforded by negotiable instruments is, as the language held in *Johnson v. Collings*, and *Archer v. The Bank of Ireland* indicates, apparent rather than real, and disappears on examination. For although the parties to these instruments stand in such a relation that value paid by one may support an action brought by another, still the existence of a consideration in some form is essential, and no recovery can be had if the presumption in its favor is disproved. A promise to accept an existing bill, may consequently be binding in favor of a holder who has given and on a drawee who has received nothing for the promise, by force of some act done, or right relinquished by or between the other parties to the instrument. When, however, a promise to accept does not, from the non-existence of the bill or from any other cause, take effect as an acceptance, it must fail as a contract, unless there is not only a consideration, but a consideration as between the promisor and promisee. And it is well established that such a promise will in the entire absence of consideration, be invalid both as an acceptance and a promise (ante).

The case of *Pillans v. Van Mierop* is not at variance with this doctrine, because the suit was between the original parties, so that if any consideration moved from the plaintiffs, they might enforce the promise whether it did or did not amount to an acceptance. This was pointed out by Mr. J. Wilmot, who observed that the effect of the transaction was to stop, prevent, and disable the plaintiffs from calling upon White for the performance of his engagement. That engagement was to give them credit on a good house in London for reimbursement. It was fulfilled when the defendants made the promise; and as the time for the repayment of the advance had not arrived, it was not possible to proceed against White. The suspension of the right to call on him was a sufficient consideration even if it lasted for a day only, or for a briefer period. It is on a like principle that the acceptance of a bill taken for an antecedent debt gives rise to a consideration by suspending the right of suit which would accrue from the dishonor of the instrument (ante).

In *Mason v. Hunt*, 1 Douglas, 297, Lord Mansfield adhered to the doctrine of *Pillans v. Van Mierop*, but qualified it by holding, that, as agreement to accept is but an agreement, it must be performed on one side in order to be binding, either as a contract or acceptance on the other. If the drawer or endorser did not comply with the conditions imposed by the drawee, the latter would be discharged. "An agreement to accept might amount to an acceptance, and might be couched in such words as to put a third person in a better condition than the drawer. If one man, to give credit to another, made an absolute promise to accept his bill, the drawer, or any other person, might show such promise upon the exchange to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor. But an agreement to accept was still but an agreement, and if it was conditional, and a third person took the bill knowing of the conditions annexed to the agreement, he took it subject to such conditions." As the tobacco which had been consigned, in the case before the court, was not of the stipulated value, the defendant was not bound to pay the bill.

This qualification of the doctrine that a promise to accept a non-existing bill may operate as an acceptance, would seem to be subversive of the foundation on which the doctrine rests. If a promise to accept in consideration of a consignment to be made by the drawer, is an acceptance, it will not be defeated by a subsequent failure to send the goods. *Craig v. Sibbett*, 3 Harris, 238; *Robinson v. Reynolds*, 2 Q. B. 96. Accordingly, when the point again arose in *Johnson v. Collings*, 1 East, 90, Lord Kenyon said, in delivering judgment, that if an agreement to do a thing was equivalent in any case to its

actual performance, it certainly was not so in that of a promise to accept a bill of exchange before it was drawn, which being neither an acceptance under the law merchant, nor assignable by the common law, was necessarily confined to the original parties, and could not be enforced by a third person. This, said his lordship, was "a promise to accept a non-existing bill, which varies the case from all that have been decided upon the subject, and I know not by what law I can call such a promise an acceptance. The consequence is that plaintiffs cannot recover upon the count as on an acceptance, and in order to permit them to recover upon the general counts, we must say that a chose in action is assignable, a doctrine to which I never will subscribe."

The case did not necessarily conflict with the rule laid down in *Mason v. Hunt*, because there was no evidence that the plaintiff took the bill on the faith of the promise, and may be distinguished from *Pillans v. Van Mierop*, where the action was instituted by the promisee. But the dicta of Lord Kenyon seem to have been regarded as conclusive by the profession and in the courts, *Ex parte Bolton*, 2 Deacon, 557, and were fully sustained in *The Bank of Ireland v. Archer*, 11 M. & W. 385, which establishes that an agreement to accept a non-existing bill does not operate as an acceptance in England, and will not be binding in favor of an endorsee who takes the bill and gives value for it on the faith of the promise. In adverting to the authorities in the United States which follow the doctrine of Lord Mansfield, Baron Parke observed, that the rule stated by Mr. Justice Story in his treatise on bills, sec. 249, would lead to an extraordinary state of things, namely, that if the endorser paid the bill away with notice of the promise to accept, the endorsee might recover against the acceptor, and if not not, so that there might be several endorsees with different remedies. And he subsequently remarked, in giving judgment, that reason pointed out, "that in order to constitute an acceptance, there ought to be a bill in existence which can be accepted; and to hold that the same act will be an acceptance or not, according to the subsequent contingency of the holder of the bill having notice of it, would introduce a strange anomaly into the relation of the parties to the bill, the drawer being an acceptor as to some and not as to other endorsees. No subsequent case appears to have cast any doubt upon the propriety of Lord Kenyon's dictum."

The English rule, as settled by these decisions is, that no recovery can be had by one man on a promise to accept a non-existing bill made to another, because there is, under these circumstances, no sufficient privity of contract to sustain an action. It is, however, not unimportant to observe that the case of *The Bank of Ireland v. Archer* would have been decided in the same manner in the United States, there being a want both of the written evidence, and of the precise identi-

fication of the bill requisite to constitute a promissory acceptance under the American decisions.

While the opinion of Lord Kenyon prevailed in England, the result was different in the United States, when the courts adhered to the doctrine of *Pillans v. Van Mierop*; and *Mason v. Hunt*, and refused to admit that it had been overruled by the *dicta* in *Johnson v. Collings*.

It was said in *Wilson v. Clements*, 3 Massachusetts, 1, that an authority to draw, or a promise to accept a non-existing bill might operate as an acceptance, but that the case did not fall within the rule, because the bill was not drawn until two years after the authority was given, which was an unreasonable delay, and discharged the defendant. Sedgwick, J., said that the language of Lord Kenyon, in *Johnson v. Collings*, must be taken in connection with the evidence in the case, which showed that the promise to accept was merely verbal, and not made known to the plaintiff when he took the bill, and he went on to remark that Lord Kenyon and Mr. Justice Grose could not reasonably be understood as asserting that a promise to accept a non-existing bill could not be binding in any case, but only that such a promise as was proved in the case before them was not an acceptance. The true rule, as laid down in *Pearson v. Dunlap*, Cowper, 578, was, that if one man to give credit to another made a written promise to accept his bill, and the latter showed the letter to a third person who advanced money upon the faith of the promise, it was an acceptance of the bill.

The doctrine of constructive or executory acceptance was again advanced in *Storer v. Logan*, 9 Massachusetts, 55, where, however, the defendant was permitted to show that the promise was subject to conditions which though not set forth in the letter in which the promise was made, were communicated to the plaintiff when he took the bill, and had not been fulfilled. In *McEvers v. Mason*, 10 Johnson, 207, Kent, C. J., said, that since a promise to accept a non-existing bill was not assignable as a promise, it was difficult to understand that it could be negotiated as an acceptance, or made the foundation of a recovery by a subsequent endorsee. In the subsequent case of *Goodrich v. Gordon*, 15 Johnson, it was, however held that, when such a promise is in writing, it will operate as an acceptance in favor of every one who relies on the promise in giving value to the bill.

The doctrine of constructive or promissory acceptance, is established in the United States, under the authority of the principal case, and in accordance with these decisions. *Wildes v. Savage*, 1 Story, 22, 27; *Baring v. Lyman*, Ib. 396, 414; *Russell v. Wiggins*, 21 Id. 213, 228; *Ogden v. Gillingham*, 1 Baldwin, 38; *Bayard v. Lathy*, 2 McLean, 462; *Cunningham v. Shaw*, 7 Barr, 400; *Vance v. Ward*, 2 Dana, 95; *Reed v. Marsh*, 5 B. Monroe, 8; *Lewis v. Kramer*, 3 Maryland, 260; *Burns v. Rowland*, 40 Barb. 368. The promise need not be

made in terms; and an unconditional authority to draw will take effect as an acceptance, when executed by the execution and negotiation of the bill. *The Bank of Michigan v. Ely*, 17 Wend. 508; *Ulster County Bank v. McFarlan*, 5 Hill, 432, 3 Denio, 553; *Bissel v. Lewis*, 4 Mich. 450; *The Bank v. Peck*, 38 Vermont, 200.

The doctrine is, however, surrounded with restrictions, which seem to have been drawn from the language of Lord Mansfield in *Mason v. Hunt*. It was there said, that if a man wrote promising to accept, and the letter was shown on the Exchange, a third person who advanced his money on it might enforce the promise, notwithstanding a want or failure of consideration as between the original parties. In *Coolidge v. Payson* (ante), Ch. J. Marshall seems to have taken it for granted, that this is the only case where a promissory acceptance can be upheld, consistently with policy and convenience. The rule, as he declared it, is, that a "letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

This definition seems to have been intended to exclude everything which it did not comprehend. It is, accordingly, well settled, that to render a promissory acceptance binding, it must come within the rule in *Coolidge v. Payson*, and fulfil the conditions which that prescribes. *Boyce v. Edwards*, 4 Peters, 111. These may conveniently be considered in their order.

*First*, the promise must be written. If an oral promise to accept a non-existing bill is valid as an agreement between the parties, it cannot be enforced as an acceptance by third persons. *Plummer v. Lyman*, 49 Maine, 229; *The Mercantile Bank v. Cox*, 38 Id. 500; *Kennedy v. Geddes*, 8 Porter, 263, 3 Alabama, 581; *The Ontario Bank v. Worthington*, 12 Wend. 593. It is not easy to discern the principle upon which this depends. Mr. Justice Wilmot said, in *Pillans v. Van Mierop*, that words pass from men lightly, and are not always accurately remembered, and it seems to have been thought that written promises derive an inherent force from the deliberation with which they may be supposed to have been made. But this distinction was unknown to the common law, which classed all unsealed contracts as parol, and held spoken words equally binding with written; and is now, to use the words of Baron Parke, in *Archer v. The Bank of Ireland*, 11 M. & W. 385, "entirely exploded." The Legislature have, from considerations of policy and convenience, made a writing necessary in various instances, but the case of *Coolidge v. Payson*, is seemingly the only one where such a rule has been arbitrarily laid down by a court. A clearer ground may be found in the reasoning of Lord

Mansfield in *Mason v. Hunt*, which indicates that the doctrine in question is one of the many applications of the principle of equitable estoppel. If a promise to accept a non-existing bill must be exhibited to a third person who relies upon it in giving value for the bill, it must obviously be in writing to come within the rule.

Next "the letter must be shown to the person who afterwards takes the bill on the credit of the letter." If this is to be understood literally, a promise to accept a non-existing bill cannot operate as an acceptance between the original parties, nor, unless the bill is subsequently negotiated, to a third person. *The Mercantile Bank v. Cox*, 38 Maine, 500; Story on Bills, 296, 449. It would, however, seem that the material requisite is, that credit should be given on the faith of the promise. If A. requests B. to advance money to C, and draw on him for reimbursement, B. is a holder for value by virtue of the loan. Accordingly, in *Pillans v. Van Mierop*, the defendant's promise to accept a bill for advances which the plaintiffs had made to White, was said to be an acceptance in favor of the plaintiffs. For a like reason, it is immaterial whether the promise is addressed to the drawer, or to the person to whom he negotiates the instrument; and in *Burns v. Rowland*, 40 Barb. 368, a letter promising to accept a bill for any amount that might be due from a third person to the person to whom the letter was addressed, was said to be a good promissory acceptance within the doctrine of *Coolidge v. Payson*.

However this may be, it is clear that to render a promise to accept a non-existing bill binding in favor of a third person, it must have been a moving cause, without which he would not have given value for the bill. This was laid down in *Storer v. Logan*, 9 Mass. 55, and *McEvers v. Mason*, 10 Johnson, 207, prior to the case of *Coolidge v. Payson*, and is sustained by the subsequent course of decision, *Lewis v. Kramer*, 3 Maryland, 265. *The Bank of Michigan v. Ely*, 17 Wend. 508; *The Ontario Bank v. Worthington*, 12 Id. 503. In *The Bank of Michigan v. Ely*, the law was stated to be, first, that a promise to accept a bill already drawn is an actual acceptance, and, second, that a promise to accept a future bill or one not in existence, is not binding, unless the bill is taken on the credit of the promise. The language of C. J. Marshall might seem to imply that the plaintiff must actually see the writing, and cannot rely on information derived through an intermediate channel. The point was, however, decided the other way in *Lewis v. Kramer*; and in *The Bank v. Ely*, the court held, that if the party is influenced by and relies upon the promise, it need not be actually exhibited to him, even under the revised statutes which require the acceptance to be shown to the person who takes the bill.

It has also been held that to render a promise binding as an accept-



ance, it must point to some particular bill drawn or to be drawn with such minuteness and certainty as it regards time, amount and parties as to identify and distinguish it from all others. *Cornegie v. Morrison*, 2 Metcalf, 381, 406; *Lonsdale v. The Bank*, 18 Ohio, 126; *Cassell v. Dows*, 1 Blackford, 335; *Kennedy v. Geddes*, 8 Porter, 263, 3 Alabama, 581; *Van Phiell v. Sloan*, 5 Rob. Louisiana, 148; *The Bank v. Tayleur*, 16 Louisiana, 498; *Schimmelpfennig v. Bayard*, 1 Peters, 264, 266. In the language of C. J. Marshall, the bill must be described in terms not to be mistaken, and a general authority to draw from time to time against future consignments is not sufficiently definite to come within this rule. *Boyce v. Edwards*, 4 Peters, 111. In *Cassell v. Dows*, the reason for this restriction was said to be the confusion that might result, if an indefinite number of bills could be put in circulation on the faith of a general authority, not identifying any particular instrument.

In New York, however, the promise to accept need not contain a particular description or identification of the bill to be drawn. *Burns v. Rowland*, 40 Barb. 368; *The Ulster Bank v. McFarlan*, 5 Hill, 432, 434. The bill must be within the limits of the authority, but the latter need have no certain limits, and may be in the broadest and most general terms. *Greele v. Parker*, 2 Wend. 545; 5 Id. 414; *The Bank v. McFarlan*.

In *Greele v. Parker*, a power to draw for \$2,500, at three and four months, was held to be well executed by a bill at the longer period. In *The Bank v. McFarlan*, the authority was to draw "on me at ninety days, from time to time, for such amounts as you may require, provided the whole amount running and unpaid shall not exceed \$3,000. The above to be good for one year only from this date." This was held to be a virtual acceptance of every bill that might be drawn under it within the year, provided the whole amount due and outstanding at any one period did not exceed \$3,000. A like decision was made in *Bissel v. Lewis*, 4 Michigan, 456.

It is generally conceded that an authority which, from generality, or any other cause fails as an acceptance, may be valid as a promise to accept, not only as between the original parties, but in favor of any one who gives value on the faith of the assurance which it holds forth. *Boyce v. Edwards*, 4 Peters, 111; *Townsley v. Sumrall*, 2 Id. 170; *Lonsdale v. The Bank*, 18 Ohio, 126; *Carnegie v. Morrison*, 2 Metcalf, 381; *Baring v. Lyman*, 1 Story, 396, 414; *Russell v. Wiggin*, 2 Id. 213, 240.

All the books agree that if the terms of the promise are not complied with by the drawer, the drawee will be discharged. *Lewis v. Kramer*, 3 Maryland, 265; *Storer v. Logan*, 9 Mass. 55; *Murdoch v.*

*Mills*, 11 Met. 5; *The Michigan State Bank v. Leavenworth*, 2 Williams, 209. A man who agrees to accept drafts drawn against consignments will not be bound unless the bills of lading are sent with the drafts. *Murdoch v. Mills*. It will make no difference that the condition is not contained in the writing, if it is made known to the holder when he takes the bill. *Storer v. Logan*. This marks the distinction between a promissory and an actual acceptance; it being well-settled that the latter cannot be controlled by an oral stipulation. When, moreover, the drawee is a guarantor or surety a substantial performance will not answer, and the promisor will be discharged by any variation from the terms of the contract, although seemingly to his advantage. *The Michigan State Bank v. Leavenworth*; *Birckhead v. Brown*, 5 Hill, 634, 2 Denio, 275. An authority to draw at sixty days will not extend to bills drawn at ninety, nor when the authority is general can the draft be made payable at a distant place. *The Bank v. Leavenworth*. In like manner an authority to draw at ninety days from the 16th will not be an acceptance of a bill drawn at ninety days from the 10th; *Lewis v. Kramer*; nor can a recovery be had on a bill drawn "after date," when the authority is to draw "after sight." *The Bank v. McFarlan*, 5 Hill, 432, 8 Denio, 553. But, although the drawee cannot be sued under these circumstances on the bill, he may still be made liable in an action had for money had and received, if the proceeds have come to his use.

In *Greele v. Parker*, 2 Wend. 545; 5 Id. 414, a bill at four months for \$2,500 was held to be within an authority to draw for that amount at three or four months, in opposition to the dissenting opinion of the chancellor. But the question whether the credit should be computed from "date" or "sight" was not raised in the court below or before the Court of Errors and Appeals; and when it arose subsequently in *The Bank v. McFarlan*, the decision was that under the true construction of such a promise the credit is to run from the presentment of the bill, which must consequently be made payable "after sight" and not after "date." It was said that the object of the stipulation obviously was to give the drawee time to procure funds to meet the bill, and would fail if he could be put in default without a previous notice or presentment.

On the other hand, in *Wildes v. Swage*, 1 Story, 22, 23, Mr. Justice Story held that the doctrine of promissory acceptance was only applicable to bills payable on demand or at a fixed time after date. It could not be applied to bills payable after sight, because there remained a future act to be done, which was necessary to reduce the contract to certainty and determine the period at which payment should be made. And as the period of presentment was also that for acceptance, which the drawee might accord or withhold at plea-

sure, it was contradictory to suppose that he had already bound himself to that by the antecedent promise which might by the terms of the instrument as drawn be refused. It is obvious from the discordance between this view and that taken by the courts of New York, that the doctrine of constructive acceptance has not yet been defined with certainty. We may find in this conflict of opinion a confirmation of the regret expressed in *Wildes v. Savage*, that a rule full of inconvenience and contrary to sound policy should have been incorporated with American law.

In the subsequent case of *Barney v. Newcomb*, 9 Cushing, 46, the court dissented from *The Ulster County Bank v. McFarlan*, and said that where the authority to draw did not point out whether the draft was to be after date or after sight, there was no rule of law governing the case, and the drawer might pursue whichever way best suited his convenience. Where the true import of an instrument was doubtful in consequence of the failure of the writer to use precise language, justice required that it should be taken most strongly against him and in favor of the person to whom it was addressed.

If the time within which the bill is to be drawn is not specified, the authority or promise must be acted on within a reasonable time; *Wilson v. Clement*, 3 Massachusetts, 1; *The Carrollton Bank v. Tayleure*, 6 Louisiana, 490. What this shall be depends on circumstances, but an interval of two years, or even of one, will ordinarily be too long *Wilson v. Clements*; *Boyce v. Edwards*, 4 Peters, 111, 121. When, however, the state of things remains essentially the same and there are no laches, mere lapse of time will not ordinarily preclude the execution of a power; *Lewis v. Clarke*, 39 New York, 216. In *Lewis v. Clarke*, the defendant sent a telegram to one Ingraham authorizing him to draw on them at twenty days' sight. He drew a bill at twenty days from date and negotiated it to plaintiffs. The defendants refused to accept and pay the instrument, alleging that the authority which they had given was not pursued. This occurred, in June, 1859, and in the month of March, 1860, the plaintiffs procured another bill from Ingraham drawn in accordance with the telegram, and gave up the first. The defendants were held liable as acceptors on the second draft, notwithstanding a letter written during the interval to Ingraham revoking the authority to draw, which was not communicated to the plaintiffs. The court said that the lapse of time between the first and second drafts, which might otherwise have been unreasonable, was excused by the failure of the defendants to answer a letter which the plaintiffs had addressed to them in August, stating that they were holders for value, and inquiring why the bill was not paid.

The revised statutes of New York provide "that an unconditional promise in writing to accept a bill before it is drawn, shall be deemed

an actual acceptance in favor of any person to whom such acceptance shall have been shown, and who on the faith thereof shall have received the bill for a valuable consideration." Whether the fulfilment of the condition at or before the negotiation of the bill will bring an authority to draw "against consignments," or "if bills of lading accompany the drafts," within the meaning of this enactment does not appear, but it is obvious that if the promise is not unconditional when the bill is taken, it cannot be rendered binding as an acceptance by any subsequent act or event; *The New York Bank v. Gibson*, 5 Duer, 574. A similar statute has been passed in Missouri, under which it has been held that the question whether the bill was taken on the faith of the promise of acceptance, is one of fact for the jury; *Lathrop v. Harlow*, 23 Missouri, 209.

A man who draws on himself is bound absolutely *ipso facto*, and the payee may proceed against him either as acceptor of the bill, or as the maker of a promissory note; *Roach v. Ostler*, 1 Manning & Ryland, 126; *Cunningham v. Wardwell*, 3 Fairfield, 160. In like manner, a draft drawn by an agent on his principal for the account of the latter, under an authority given by him, is accepted by the very act of drawing, on general principles and aside from the peculiar doctrine which we have been considering; *Hasey v. The Beet Sugar Company*, 1 Douglas, Michigan, 193; *Van Reimsdyk v. Kane*, 1 Gallison, 830; 9 Cranch, 183. In *Hasey v. The Beet Sugar Company* the defendants were accordingly held liable without notice of dishonor, on a bill drawn by the president of the corporation on the treasurer. See *Barnes v. Hovey*, 5 Massachusetts, 23; *Mayhew v. Prince*, 1 Id. 55. The principle is the same when a partner draws on the firm in his own name in the course of the business of the partnership; *Dougal v. Cowles*, 5 Day, 511; or under an express authority given by them. The court said that there was an implied agreement by every drawer that the bill should be accepted and paid when due. When, therefore, a partner drew on the firm for the price of goods bought for their use, they incurred an obligation to the payee which did require to be confirmed by acceptance. Under these circumstances the hand which is to accept is virtually the same as that which draws, and no further evidence of assent is necessary. The acceptance will consequently be binding in favor of a subsequent holder, whether he is or is not cognizant of the authority under which the bill is drawn, or in other words, whether he takes it on the credit of the drawer or drawee.

The rule that execution is not complete before delivery, applies to the making, endorsement, and acceptance of bills and notes. Proof of the signature of the maker or endorser consequently will not be sufficient unless it also appears that there was an actual or constructive delivery to the payee or endorsee. This is obvious when the endorsement is

general; *Marston v. Allen*, 8 M. & W. 494, 503; *Adams v. Jones*, 12 A. & E. 455; *Burd v. Hampshire*, 1 M. & W. 365; and equally true when it is special and designates the endorsee; *Rex v. Lambton*, 5 Price, 428; *Bromage v. Lloyd*, 1 Exchequer, 32, 33. A deed, and a *fortiori* a bill may be delivered without being actually handed over or transferred; *Doe v. Knight*, 5 B. & C. 671; *Blight v. Schenck*, 10 Bar, 285; but signing, sealing, and even acknowledgment, are ceremonies which will not constitute delivery if the instrument remains subject to the control and disposition of the grantor; *Jackson v. Dunlap*, 1 Johnson's Cases, 114; *Jackson v. Phipps*, 12 Johnson, 418; *Critchfield v. Critchfield*, 12 Harris, 100.

The question arose in *Marston v. Allen*, on a traverse of the averments of the declaration that one Harrop endorsed the bill to Edward Marston, and that Edward Marston endorsed it to the plaintiff. The defendant proposed to show that Harrop had received the bill as an officer of the Imperial Bank, and endorsed it as the property of the bank to Edward Marston, who was also in their employ, and that Marston transferred it wrongfully and in violation of his trust to the plaintiff, who took it with notice of the fraud. This evidence having been rejected at the trial as not tending to maintain the issue, the court in banc held that it was admissible under the pleadings and should have been received. It was said to be clear that delivery was essential to an endorsement, and that a delivery procured or vitiated by fraud might be treated as a nullity by the person to whom the wrong was done. It is obvious from this decision that when issue is joined on a plea of "not endorsed," it must appear not only that the defendant put his name on the back of the instrument, but that it was delivered in a way to confer title on the alleged endorsee.

It results from the same principle that title will not pass even under a special endorsement without a delivery to the endorsee or to some one who takes the instrument for his use. *Brind v. Hampshire*, 1 M. & W. 365. In *Brind v. Hampshire*, Usher who was at the time residing abroad, sent a bill of exchange to the defendant Humphries, with a direction to hand it over to the plaintiff, to whose order it was drawn. Humphries wrote to the plaintiff, acknowledging the receipt of the instrument, and asking whether it should be sent to him by post. In the meantime and before the plaintiff could reply, Usher countermanded his first instructions, and directed Humphries to make a different disposition of the bill. It was held that the plaintiff had acquired no right or title to the instrument, and could not maintain trover for it against Humphries. The latter was clearly an agent for Usher in the first instance, and did not lose that character by communicating what had occurred to the plaintiff. Until delivery the bill

remained the property of Usher and might be disposed of at pleasure by him.

It is also settled that the hand which delivers must be the same as that which endorses or acting in the same right. *Glascock v. Smith*, 25 Alabama, 474. A delivery after death consequently will not pass the title to a note which the payee or maker has endorsed during his life. In *Glascock v. Smith*, a note forming part of the assets of a partnership was endorsed by one of the partners and delivered after his decease by another, and it was held that no title passed to the endorsee. The principle applies even where the person who delivers is the executor of the person who endorsed. *Clark v. Sigourney*, 17 Conn. 511; *Bromage v. Lloyd*, 1 Exchequer, 32. In the latter case, Pollock, C. B., said that the note was endorsed by the deceased without delivery, and delivered by the executor without endorsement. There was consequently no valid endorsement. The law was held the same way in *Clark v. Boyd*, 2 Ohio, 56.

While it may be shown under the general issue or a special plea of not endorsed, that the instrument was transferred to an agent or servant, under circumstances which did not pass the title, *Marston v. Allen*, 8 M. & W. 494; *Adams v. Jones*, 12 A. & E. 455; this is only true as between the original parties, and such evidence will not be admissible against a subsequent holder for value without notice of the fraud. *Hayes v. Caulfield*, 5 Q. B. 81.

It has been held, that an acceptance follows the same rule as an endorsement, and may be rescinded by the drawee before parting with the bill. *Cox v. Troy*, 5 B. & Ald. 474. In *Cox v. Troy*, the plaintiff presented a bill of exchange to the defendants, who asked time for inquiry and consideration. He then went away, leaving the instrument in their hands, and did not return for several days. In the meantime, the defendants wrote their name across the bill as acceptors, but subsequently erased it and returned the instrument to the plaintiff. The court said, that the defendants were not bound by their signature, and might refuse to pay the bill. Until what they did was communicated to the plaintiff, it could not prejudice him, or in any way vary his position. It was an opinion of *Pothier* which Lord Ellenborough had cited with approbation, that a drawee who has put his name to the bill, might change his mind before parting with the instrument, and erase the signature.

There is however this material difference between an acceptance and an endorsement, that while the title of an endorsee is derived through the endorser and depends solely on him, a man who presents a bill for acceptance has a present right growing out of the antecedent act of the drawer. If the drawee takes the bill for consideration or advisement, he becomes a mere custodian or bailee, and must return it within a reasonable

time or when demanded, on pain of being liable as an acceptor (ante). His possession is that of the party to whom the instrument rightfully belongs, and hence an oral or written promise of acceptance communicated to the latter, will be binding without a transfer or delivery of the bill. But it is still true in this, as in other instances, that until the minds of the parties meet there can be no valid contract. If the drawee declares his intention to accept the bill to the payee, he will be bound whether the instrument is in the hands of the latter or his own. But writing his name on the bill as acceptor and erasing it, will have no greater effect than if the same thing were done in a letter which was not sent.

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LETTERS OF CREDIT.

LAWRASON v. MASON.

In the Supreme Court of the United States.

FEBRUARY TERM, 1806.

[REPORTED, 3 CRANCH, 492-496.]

*A letter from the defendants to J. M., saying that they would be his security for 130 barrels of corn, payable in twelve months, will sustain an action of assumpsit against the defendants by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn.*

ERROR to the Circuit Court of the District of Columbia.

This was an action of *assumpsit*, brought by Mason against Lawrason, surviving partner of the firm of Lawrason & Smoot, upon the following note:

“ Alexandria, 28th November, 1800.

Mr. James McPherson,

Dear Sir,

We will become your security for one hundred and thirty barrels of corn, payable in twelve months.

(Signed)

LAWRASON & SMOOT.”

The declaration contained several counts, laying the *assumpsit* in different forms, but the substance of each was, that the plaintiff, relying on and placing confidence in the promise of the defendants, and at their instance and request, sold and delivered the corn to McPherson, at the price of three dollars a barrel, who, although requested, never paid the plaintiff therefor, of which the defendant had notice, whereby the defendants became liable, and, in consideration thereof, promised to pay. The defendant pleaded the general issue, and at the trial a verdict was taken for the plaintiff, subject to the opinion of the court upon a demurrer to evidence, which stated in substance, that the defendants signed and delivered the said note to McPherson—that he applied to the agent of the plaintiff for the corn, and offered three dollars a barrel, payable in twelve months—that the agent consulted the plaintiff, who agreed that McPherson should have the corn on those terms, if he would give security—that McPherson then offered as his security, Lawrason & Smoot. The agent agreed to take them, if they would give their assumption in writing. In a few days afterwards, McPherson sent to the agent the said note of Lawrason & Smoot. Before the corn was delivered, the agent informed the plaintiff what had passed between himself and McPherson, relative to the corn, and also showed him the note, and asked him whether it would do; to which he replied, he supposed it would. But they called upon Lawrason, and asked him if he was content to be McPherson's security for this corn. He hesitated at first, but said he *must be so*, as he had promised; or, as his word was out, *he would*; or words to that effect; whereupon the plaintiff suffered McPherson to take the corn, at the price of three dollars per barrel, which he agreed to give. That there was another debt due to the plaintiff from McPherson, about the 1st of January, 1801, which he was unable to pay.

That about the 1st of January, 1800, McPherson gave his promissory note for the amount due for the corn, payable to Lawrason & Smoot, with intent that they should endorse it, but, upon its being presented to Smoot, he refused, saying, that McPherson had failed to furnish them with meal, which he had agreed to deliver to them for their endorsement; he therefore would not become security; but upon being shown the note of



the 28th of November, he acknowledged that it had been given by them.

The plaintiff also produced the certificate of discharge of McPherson, under the bankrupt law, dated the 15th September, 1802, and proved by witnesses that he became insolvent in the year 1800.

Upon this demurrer the judgment of the court below was for the plaintiff.

*Swann*, for the plaintiff in error. The promise in this case was not made to the plaintiff; and no action can be maintained against a person who is a stranger to the consideration, and who is not a party to the agreement, *Cro. El. 369, Jordon v. Jordon, Esp. N. P. 105, 106.* Perhaps an action might lay for the deceit, but not upon the *assumpsit*. The will of both parties must concur at the same moment. If I make an offer of goods at a certain price, and give time to the other party to consider of it, and within the time the other party agrees to the terms, I am not bound to comply. There was no consideration, and consequently no contract, *3 T. R. 653, Cook v. Oxley.*

Besides, it does not appear that the money was ever demanded of McPherson; and, until he had refused to pay, no right of action could accrue against the defendant.

*C. Lee, contra.* There is an essential difference between common contracts and a *letter of credit*. The latter is a mercantile instrument, bottomed upon the principle of *good faith*. It is a promise to him who will give credit to the third person, and the consideration is the actual delivery of the money or goods to the third person, *upon the faith* of the letter of credit. This is, therefore, a promise to the plaintiff, and a good consideration is raised by the delivery of the corn upon the faith of the defendant's note in writing. All the forms of action upon a letter of credit, are in *assumpsit*.

It is objected that no demand was made on McPherson; the answer is, that he was known to both parties to be insolvent.

MARSHALL, Ch. J., delivered the opinion of the court to the following effect:

This action is grounded upon a note in writing, which was certainly intended by the defendants to give a credit to McPherson. They are bound by every principle of moral rectitude and good faith to fulfil those expectations which they thus raised, and which induced the plaintiff to part with his property. The evidence was clear that the credit was given upon the faith of the letter.

Unless, therefore, there is some plain and positive rule of law against it, the action ought to be supported.

In the case cited from *Espinasse*, the rule is laid down too broadly. If compared with analogous cases, it will be found to be considerably modified.

Thus, if money be delivered by A. to B. to be paid over to C., although no promise is made by B. to C., yet C. may recover the money from B. by an action of *assumpsit*.

If it be said that in such a case the law raised the *assumpsit* from the facts, and if the facts do not imply an *assumpsit*, no action will lay;—it may be answered, that in the present case there is an *actual assumpsit* to all the world, and any person who trusts, in consequence of that promise, has a right of action.

It has been suggested by the counsel for the defendants, that, although an action of *assumpsit* will not lay, yet possibly the plaintiff might support an action for the *deceit*. But an action for the deceit must be grounded upon the breach of the promise. And if an action will lay in any form, the present seems to be at least as proper as any other.

Judgment affirmed.

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The case of *Lawrason v. Mason*, was one in some respects of the first impression, and it had a corresponding influence on the subsequent course of decision. It showed with unusual clearness, that a writing addressed to one man may serve as the basis of an executory contract with another whom it is designed to influence. *Duval v. Trask*, 12 Mass. 154. This is not inconsistent with the rule that the act constituting the consideration must be done at the instance of the defendant, because a request may well be made through an intermediate channel. *McNaughton v. Complin*, 9 Wisconsin, 216; *Bradly v. Cary*, 8 Greenleaf, 234. To warrant a recovery on such evidence, it must however,

appear not only that the writer knew that the instrument might be used as a means of obtaining credit from third persons, but that he intended to make himself directly responsible to them. *Birkhead v. Brown*, 5 Hill, 634 ; 2 Denio, 375. A letter accepting a proposal to erect a house and promising payment as the work goes on, may induce mechanics and material men to trust the builder to a greater extent than they would otherwise have done, but it will not enable them to maintain an action against the owner, or create a lien on the property or fund. The obligation is exclusively to the builder, and the effect on third persons an incidental result for which the writer is not answerable. When, however, a promise to an individual is intended as an assurance to others, that the promisor will be answerable to them, the engagement will not be less effectual because it is made circuitously ; *Dorland v. Mulhollan*, 10 Ohio, N. S. 192 ; *McNaughton v. Conkling*, 9 Wisconsin, 316 ; *Benedict v. Sherrell*, Hill & Denio, 219 ; *Bradley v. Carey*, 8 Greenleaf, 233. The point can hardly be said to have arisen in *Lawrason v. Mason*, because the plaintiffs in error obtained a direct promise from Lawrason before suffering McPherson to take the corn, but the Ch. J., rested the decision on the broad ground, that such a promise was to be regarded as an "assumpsit to all the world," and any one who acted on the faith of it might sue. It is therefore clear, that when a promise addressed to one man, is intended to induce another to make advances or give credit in any other form, the law will have regard to the substantial purpose, and give a remedy to the party injured by the breach. *Russell v. Wiggin*, 2 Story, 213, 233.

This is a sound application of the canon that writings shall be so interpreted as to attain the end which the parties had in view. Taken literally the contract in *Lawrason v. Mason*, would have failed because no consideration moved from the nominal promisee, McPherson, and he could in no event have recovered against Lawrason, who was a mere surety for him to the vendor ; and the same remark applies to *Bradley v. Cary*, 8 Greenleaf, 234 ; and *McNaughton v. Conklin*, 9 Wisconsin, 216 ; which were determined on the same principle. It is an established rule dating as far back as the origin of the action of assumpsit, that the compensation is due to the party who gives value on faith of the promise, whether he is or is not the promisee (ante, 169). The principal case is not therefore an authority for the conclusion which has sometimes been deduced from it, that one who is a stranger both to the consideration and the promise may enforce the contract.

The doctrine that an "assumpsit to all the world," may confer a right of suit on an individual who acts on the faith of the assurance which it holds forth, applies when a reward is offered generally to the public for the detection of a criminal or the recovery of lost or stolen goods ; *Freeman v. Boston*, 5 Metcalf, 56 ; *Harsen v. Pike*, 16 Indiana, 140

*Lancaster v. Balsh*, 4 M. & W. 16; *Falkirk v. Baker*, 1 M. & S. 108; *England v. Davidson*, 11 Ad. & E. 856; *Smith v. Moore*, 1 C. B. 438; *Thatcher v. England*, 3 Id. 254; *Gerhard v. Bates*, 2 Ellis & Bl. 476, 488; and it is well settled that a recovery may be had under such circumstances, on showing that the plaintiff rendered the stipulated service without proof that he read the advertisement or was influenced by the hope of the reward. *Williams v. Cadwardine*, 4 B. & Ad. 621; *Watson v. The Earle of Charlemont*, 12 Q. B. 856; *Wontner v. Sharp*, 4 C. B. 404; *Wheelton v. Hardisty*, 8 Ellis & Bl. 232, 238. There is in such cases a contract with every person who performs the condition on which the defendant agreed to be bound, and the law will presume that the inducement, which the latter held out, reached his ears and was an incentive to the course which he pursued. In *Williams v. Cadwardine*, the plaintiff was held entitled to recover, although the jury found that he was actuated by motives of revenge, and not by the hope of gaining the promised compensation. All that is requisite for a recovery under such circumstances, is that there shall be a consideration of benefit on one side or of harm on the other, which the promise would in the ordinary course of things have tended to induce, and in *Bull v. Talcott*, 2 Root, 115; a promise to pay a sum certain to any one who would build a court house in the manner pointed out by the promisor, was held binding in favor of the plaintiff, on proof that he had done the work in the way prescribed. In like manner a letter without address "guaranteeing the payment of any purchases of bagging and rope which Thos. Barrett may have occasion for between this and the first of December next, was held in *The Louisville Man. Co. v. Welch*, 10 Howard, 461, to make the writer answerable to the defendants who had furnished the articles in question on the faith of the letter, although it was an assumpsit to all the world, and did not take effect as a contract until the sale was made. And when the question arose in *Phillips v. Bateman*, 16 East, 356, on a promise made publicly through a circular, to be answerable to the inhabitants of Pembroke, and its vicinity, for the payment of the notes of the Milford Bank to the extent of £30,000, the action failed for want of a consideration, and because the plaintiff did not prove that he was an inhabitant of Milford, and might perhaps have been sustained but for these objections. *Watson's Executors v. McLaren*, 19 Wend. 557, 566.

It results from these decisions, that a man who acts in pursuance of a general promise or request, is as much entitled to compensation as if the contract was made specifically with him. No good reason can be assigned why a guarantee or letter of credit, addressed generally to all the world, should not come within this principle, and be binding in favor of any one who trusts the principal. The *aggregatio mentium* which is indispensable to the validity of a contract arises under these

circumstances, when the act is done which the promisor requires, and the obligation is virtually the same as if the request had been made to an individual instead of the community at large (ante, 96).

The question arose in *The Union Bank v. Costar*, 1 Sanford, 563; 3 Comstock, 203, on the following letter written by Hecksher and Costar, who were engaged in business in the city of New York, and sent by them to Kohn, Daron & Co., merchants of New Orleans,

"NEW YORK, May 9, 1841.

SIR:—We hereby agree to accept and pay at maturity any draft or drafts on us at sixty days' sight issued by Messrs. Kohn, Daron & Co. of your city to the extent of \$25,000, and negotiated through your bank.

HECKSHER & COSTAR."

Below was a guarantee signed by John G. Costar, which was the immediate cause of action. "I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit." The letter of credit was not directed or addressed, the object being to enable Kohn, Daron & Co. to present it to the president of any bank that would make the required advance. It was accordingly exhibited to the City Bank of New Orleans, which on the faith thereof purchased a draft by Kohn, Daron & Co. on Hecksher & Costar, which was duly paid. The letter was subsequently exhibited to the plaintiffs who bought two other drafts on Hecksher and Costar for \$9,000 and \$4,000 respectively, one of which was honored, but when the second came to be presented acceptance was refused. Suit was thereupon brought on the guaranty against the defendant. It was said on his behalf, that the promise, if any, was to Kohn, Daron & Co., and the plaintiffs were strangers to the contract and could not sue. It was also contended that the agreement which was for the debt of a third person, and must be in writing under the statute of frauds, was void for uncertainty as not expressing the name of the person to whom, or the consideration on which, the defendant agreed to be answerable. The court said that it seemed to be questionable whether a party who advanced money on the faith of a general letter of credit, could sustain an action on it under the law as held in England. *Russell v. Wiggin*, 2 Story, 214; *Bank of Ireland v. Archer*, 11 M. & W. 385. The reason given was that there was no sufficient privity, and that the contract was only between the writer of the letter and the person for whose benefit the credit was designed. The contrary doctrine prevailed in the United States. Letters of credit were of two kinds, general and special. A special letter was addressed to a particular individual by name; it was confined to him, and no one else could act upon it. A general letter, on the contrary, was addressed to any and every person, and therefore gave any one to whom it might be shown authority to make the advance which it re-

quired. A privity of contract arose when this occurred between him and the writer of the letter, and it became in legal effect the same as if addressed to him by name. *Russell v. Wiggin*, 2 Story Rep. 214, 12 Massachusetts, 154; *Carnegie v. Morrison*, 2 Metcalf, 381, 12 Wend. 393, 12 Peters, 207.

Another ground taken for the defence was that when the City Bank of New Orleans acted on the letter of credit, it ceased to be general and became a definite and binding contract with them. They acquired a right of suit which could not be shared or exercised by any other person. The court were, however, clearly of opinion that this argument could not be sustained. A general letter of credit might contemplate a single sale or advance, or an open, continuing credit, embracing a series of transactions. In the latter case the principal was not necessarily obliged to deal with a single individual, but might obtain credit wherever he could, and make successive purchases from different persons. When such was the design, every one who acted under it would acquire a distinct and several right which he might enforce by suit. This was the usual course of business when letters of credit were issued by commission houses in New York, to facilitate the purchase of produce in the Western States, or when country merchants came to purchase goods in the city. To attain the end in view in such instances the purchaser must be unfettered by restrictions, and free to buy from time to time wherever he could do so to the most advantage. In the case before the court the letter of credit obviously did not contemplate one transaction, but several drafts, limited in the aggregate to \$25,000. And although the address "Sir," and "your bank," was in the singular number, it was obviously meant to be understood distributively as applying to any bank or banks which should purchase bills in the way prescribed. The right which the City Bank had acquired under the contract was, therefore, not inconsistent with the existence of a similar right in the plaintiffs. The objection on the ground of the statute of frauds was equally invalid. That was definite which could be made so, and when the plaintiffs acted under the contract it became as certain as if they had been named in the first instance. And the consideration of the guaranty was sufficiently apparent on reading it in connection with the principal obligation. Both were executed at the same time, and constituted, in effect, one instrument. See 1 Smith's Leading Cases, 464; 2 Id. 316, 6 Am. ed.

It is well settled in accordance with this decision that a guaranty or letter of credit, pledging the credit of the writer generally in aid of an individual, is binding and may be enforced by every one who pursues the course which the guarantor requires. *Massey v. Rainer*, 22 Pick. 223; *Adams v. Jones*, 12 Peters, 207; *Walson v. McLaren*, 19 Wend. 557, 566; 26 Id. 425; *The Louisville Manuf. Co. v. Welch*, 10 Howard,

564; *Duval v. Trask*, 12 Mass. 254; *Lowry v. Adams*, 22 Vermont, 160; *Moore v. Hall*, 10 Grattan, 284, 295; *McNaughton v. Conkling*, 9 Wisconsin, 216; *Walton v. Dodson*, 3 Carr & Payne, 162.

A request to the community at large may obviously confer a right to compensation upon an individual who responds in the way required, but there is more difficulty where a promise to one man is made the foundation of a demand by another. The obligation of a contract is insusceptible of being assigned, and can only be enforced by and between the contracting parties. When, however, the request is designed to reach a third person, who acts accordingly, he and not the person to whom it is ostensibly addressed will have the right to sue. *Murdock v. Mills*, 11 Metcalf, 6; *Barney v. Newcomb*, 9 Cushing, 46; *Adams v. Jones*, 12 Peters, 207; *McNaughton v. Conkling*, 9 Wisconsin, 216.

In *Lawrason v. Mason*, a letter to a purchaser was held to make the writer answerable to the vendor as a guarantor or surety. So in *Boyce v. Edwards*, 4 Peters, 111, a letter, authorizing one Hutchinson to draw to the full amount of all consignments subsequently made by him, was said to be evidence of a contract with the plaintiff, to whom the letter was exhibited, and who gave value for the bills so drawn, on the faith of the assurance which it contained. Such a promise is a circulating one, and when a third person acts upon it, the contract is by interment of law made directly with him. *Russell v. Wiggin*, 2 Story, 213, 237.

Much necessarily depends, in cases of this description, on the terms in which the authority is given. In *McNaughton v. Conkling*, 9 Wisconsin, 215, a letter of introduction, asking the person to whom it was addressed, to assist the bearer in his purchases, and adding that the writer would be responsible for any goods not exceeding \$5,000, which he might buy, was said to be sufficiently broad to include third persons and make the defendant responsible to any one who acted on the authority which it gave. When, however, a similar letter stated that the bearer was solvent, and that the writer would endorse for him to the extent of \$100, it was held that the instrument was a mere proposal, under which the guarantor was not answerable without notice of the intention to accept it, and a request that he would endorse. *Stockbridge v. Shoonmacker*, 45 Barb. 100; ante, 80, 102.

In *Lawrason v. Mason*, the person nominally addressed was a mere channel of communication between the real contracting parties. A contract between two persons may, however, contain stipulations on which a right of action may accrue to a third who had no interest in the contract when originally made. *Carnegie v. Morrison*, 2 Metcalf, 381, 396. It is, for instance, not unusual for two parties to agree expressly or by implication, that all bills not exceeding a certain sum, that may be drawn by one of them shall be accepted and paid by the other.

Under these circumstances the drawer will be entitled to damages, as a matter of course, if the contract is not fulfilled. But it has also been decided that such a promise may be binding in favor of a third person who gives value for the bills, in reliance on the assurance which it holds forth. *Murdock v. Mills*, 11 Metcalf, 6; *Barney v. Newcomb*, 9 Cushing, 46; *Lonsdale v. The Lafayette Bank*, 18 Ohio, 126.

In *Boyce v. Edwards*, 4 Peters, 111, a letter from a banker in New York, authorizing his correspondent in Augusta to draw for the full value of all consignments of cotton, was accordingly held to be evidence of a contract with the plaintiff, who sold cotton to the drawer and took the bills in payment.

The principle has been applied in other instances, and is now a well-established rule in the United States. *Murdock v. Mills*, 11 Metcalf, 6; *Barney v. Newcomb*, 9 Cushing, 46, 54; *Russell v. Wiggin*, 2 Story, 213. In *Russell v. Wiggin*, the plaintiffs agreed in writing with Ebenezer Breed, to accept all bills, not exceeding £15,000, that might be drawn by the latter within twelve months; Breed agreeing, on his part, by a separate instrument, to remit sufficient funds to meet the bills when ripe. The former writing was exhibited to the plaintiff who sold merchandise to Breed, and took his drafts on the defendants. Breed failed soon afterwards, and the drafts were dishonored when presented. The plaintiff thereupon sued to recover damages for the breach. The ground taken for the defence was the want of privity of contract between the plaintiff and the defendants. The contract was executory between the defendants and Breed, and he had failed to make remittances to meet the bills. Opinions from Sir William Follett, Sir Frederick Pollock, and other eminent English counsel, were produced and read at the argument, all distinctly stating that there was, according to the law of England, no engagement, direct or indirect, by the defendants to the plaintiff, and that they were not in any way liable to him.

Story, J., after stating the objection, went on to say: "It appears to me that this is an inference not justly deducible from the facts; and I know of no authority in English jurisprudence which countenances, far less any which establishes it, under circumstances like the present. On the contrary, I have understood and always supposed, that, in the commercial world, letters of credit of this character, were treated as in the nature of negotiable instruments; and that the party giving such a letter held himself out to all persons, who should advance money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills. And I confess myself totally unable to comprehend, how, upon any other understanding, these instruments could ever possess any general circulation and credit in the commercial world.



“No man is ever supposed to advance money upon such a letter of credit, upon the mere credit of the party, to whom the letter is given; and I venture to affirm, that no man ever took bills on the faith of such a letter, without a distinct belief, that the drawee was bound to him to accept the bill when drawn, without any reference to any change of circumstances, which might occur in the intermediate time between the giving of the letter of credit and the drawing of the bill under the same, of which the holder advancing the money, had no notice. Any other supposition would make the letter of credit no security at all, or at best, a mere contingent security, and the money would, in effect, be advanced mainly upon the credit of the drawer of the bills, which appears to me to be at war with the whole object for which letters of credit are given. Let me state one or two cases to illustrate the doctrine, which, it seems to me, is applicable to letters of this sort. Suppose the present letter of credit had contained an express clause, by which the defendants should directly promise any and all persons, who should advance money and take bills on the faith thereof, that they would accept and pay the bills, so drawn in their favor; can there be any doubt, that the promise would be available in favor of the persons making such advances, and create a direct privity of contract between them and the person, who gave the letter of credit? If there could be no doubt in such a case, then it seems to me, that the circumstances of the present case, and indeed, of all cases of letters of credit of a similar character, do naturally and necessarily embody an implied promise to the same extent, and, therefore, ought to be governed by the same rule; for there can, in the intendment of the law, be no just distinction between cases of an express promise and cases of an implied promise, applicable to transactions of this sort. Again, suppose, when the plaintiffs were about to advance their money on their bills, with the letter of credit before them, a partner, or authorized agent, of the firm of Wiggin & Co., had stood by and said, take these bills on the faith of this letter of credit, and our house will duly accept and pay them, and, upon the faith of that statement, the money was advanced and the bill was taken; could there be a doubt, that there would be a privity of contract created directly between the plaintiffs and the defendants, and they might compel the defendants to accept and pay the bills, or indemnify them for the breach thereof? And yet, stripped of its mere external form, that is the very case before the court. The letter of credit was drawn to be carried abroad, and to be shown to any person or persons, who would advance funds thereon to the drawer, and it imported, that, if any persons, to whom it was shown, should advance the money and take the bills on the faith thereof, the defendants would accept and pay the bills. Their letter of credit spoke this language to all the world, as expressively, as if they had stood by, and

repeated it by their agent. Take the case of a common letter of guaranty, where the guarantor says, in general terms, in a paper addressed to A. B., the party for whose benefit it is given, 'I hereby guaranty to any person, advancing money or selling goods, to A. B., not exceeding £100, the payment thereof, at the expiration of the credit, which shall be given therefor.' Can there be a doubt, that any person making the advances, or selling the goods, upon the faith of the letter, is entitled to treat the paper as containing a direct and immediate promise to himself to guaranty the payment, notwithstanding it is addressed to A. B. ? In the commercial world, as far as I know, no doubt has as yet ever been entertained on this subject ; and yet, transactions of this sort are of every day's occurrence, especially where the person, by whom the advance is to be made, is uncertain or unknown. The case of *Adams v. Jones*, 12 Peters, R. 207, 213, is in point to show, that such a guaranty, in such general terms, will bind the guarantor in favor of any person, who shall trust the party upon the faith and credit of the guaranty. There is no pretence, in such a case, to say, that there is not a sufficient consideration for the promise or obligation ; for the consideration need not be immediately for the benefit of the guarantor ; but it will be sufficient, if there be a valuable consideration, moving from the guarantee at the request of the guarantor, in favor of a third person, for whom the benefit is designed. It is like the common case, where one man, for a valuable consideration of forbearance, or otherwise, undertakes to pay the debt of another, the question is not of gain to the promisor, but of loss, or detriment, or delay, on the part of the promisee. Lord Mansfield's reasoning, in *Pillans v. Van Mierop*, 3 Burr. R. 1663, treats it as a clear case of a sufficient consideration ; that it is a mercantile transaction ; and that the very nature of it imports an undertaking by the promisor, to the persons taking the bills, to honor them. Lord Mansfield went further in that case, and held, that the agreement to accept amounted to an actual acceptance in favor of the party, upon the ground that he advanced the money, and drew the bill, upon the faith of the prior negotiations and promise. Mr. Justice Yates, in the same case, said, that 'any damage to another, or suspension, or forbearance of a right, is a foundation for an undertaking, and will make it binding, although no actual benefit accrues to the party undertaking.' He added : 'Now, here the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs.' In the case at bar a benefit did, in fact, accrue to Wiggin & Co. ; for, in no other way, could they have received the interest and advances intended to be obtained by their grant of the letter of credit. In *Pierson v. Dunlop*, Cowper R. 571, 573, and in *Mason v. Hunt*, 1 Doug. R. 297, Lord Mansfield took notice of the true distinction between cases, where a

promise enures solely between the parties, and where it enures in favor of a third person also. 'It has been truly said, as a general rule (was his language), that the mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances, which may induce a third person to take the bill by endorsement. But, if there were such circumstances, it may amount to an acceptance, although the answer be contained in a letter to the drawer.' The cases of *Johnson v. Collings*, 1 East, R. 98, and *Clarke v. Cook*, 4 East, R. 56, do not in any manner shake the propriety of this doctrine, as to its creating a privity of contract between the parties, whether it amounts to an acceptance, or not; and Mr. Justice Le Blanc, in both cases, expressly recognized Lord Mansfield's doctrines, as containing the true limitations and distinctions, which ought to govern in all cases of this sort. In the case of *Johnson v. Collins*, as well as in the case of *Milne v. Priest*, 4 Camp. R. 393, the promise to accept had not been shown the party taking the bill, and therefore, the bill was not taken on the faith thereof. Nor, indeed, had it ever been authorized to be shown to the party; which constitutes the striking difference between such a promise and a letter of credit, the letter being, *ex vi termini*, designed to be shown, if necessary, to obtain the very credit advances from a third person. Lord Mansfield, indeed, guarded himself on this very point, and said, not that it always does not create an acceptance, but that it may do so. Now, if it would in any case create an acceptance, *a fortiori*, it would create a privity of contract, founded upon the promise to accept; for the latter must, in all cases, constitute the foundation of the former. In none of these cases was the point presented exactly under the view, in which it now comes before this court. In neither of them was there a letter of credit designed to circulate, and thus to preserve credit to the bills which should be drawn. And not one word, in the reasoning of any of these cases, hints at any suggestion, that a letter of credit, in its commercial sense, would not create such a privity, if it was intended to be shown and used to induce any third person to advance money on the bills. If the question was entirely new, I confess that I should not entertain the least doubt, that, according to the known course of mercantile transactions upon letters of credit of this sort, the giver and the receiver intended them to be a circulating medium of credit for the receiver, and that the promise to accept, should be an obligatory contract, with any and every person, who should advance money on the bills on the faith thereof. The language of Lord Mansfield, in *Mason v. Hunt*, 1 Doug. R. 297, 299, is exceedingly strong for this purpose: 'There is no doubt,' said he, 'that an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawer. If one man,

to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange, to get credit, and a third person who should advance his money upon it, would have nothing to do with the equitable circumstances, which might subsist between the drawer and the acceptor. But an agreement to accept is still but an agreement; and, if it is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions.' Now, it is impossible to read this language, and not to feel, that, if the case were one of credit, designed by the parties to be used upon the exchange, it would necessarily create a privity of contract between the party advancing his money and the drawee, binding upon the latter. In short, the contract would be a contract, not with the drawer alone, but with any party who should advance the money on the faith of the letter. I have seen no case in England which shakes, much less overturns this doctrine. And if there were, I should pause a great while before I could bring my mind to desert the clear judgment of that great judge, Lord Mansfield, never excelled as a judge in the administration of commercial jurisprudence, upon a question of such plain equity and justice, in favor of any other and subsequent adjudication by other minds. I consider a letter of credit, drawn, like the present, for purposes of a general nature, to be equivalent in import and intention to the following language:—'Take this letter of credit, show it to any person whatsoever, and I promise any person, who shall, on the faith thereof, advance you money on bills drawn within the scope thereof, that I will accept and pay those bills.' I confess myself unable to perceive, upon any grounds of the common law or of common sense and justice, why such a circulating promise should not be obligatory." In accordance with these views, judgment was rendered for the plaintiff.

It is well established under this decision, that "where a party holds the written authority of another to draw bills on him, with a promise to accept them when so drawn, a third person purchasing such bill for a valuable consideration, on the faith of such written authority, can maintain an action against the writer in his own name for the breach of such promise to accept;" *Murdock v. Mills*, 11 Metcalf, 6; *Barney v. Newcomb*, 9 Cushing, 46, 54; and a promise to accept will be implied from a general and unqualified authority to draw. When the contract is an indirect one through the drawer, it must be in writing, although a direct oral promise that, if another will give value for a bill, it shall be paid, is binding, and may be enforced by the promisee. *Townsley v. Sumrall*, 2 Peters, 170. As such promises are not within the statute of frauds, *Townsley v. Sumrall*, the reason for this distinc-

tion is not apparent, but it would seem to have been established by the courts from motives of policy and convenience (ante, 327).

The subject was considered in a somewhat different aspect in *Carnegie v. Morrison*, 2 Metcalf, 381. The defendants were bankers in London, and their agent, Oliver, wrote the following letter to them, and delivered it to Bradford, a merchant in Boston.

“BOSTON, March 4, 1837.

MESSRS. MORRISON, KRIDER & CO., London.

Mr. John Bradford, of this city, having requested that a credit may be opened with you, for his account, in favor of D. Carnegie & Co. of Gottenburg for £3,000. I have assured them it would be accorded by you on the same terms and conditions.”

At the same time, Oliver took from Bradford a receipt, by which the latter pledged himself “to cover all drafts that might be drawn on his account in accordance with the letter.” Bradford then wrote to the plaintiffs, to whom he was largely indebted, enclosing the letter of credit. He failed soon afterwards on the 24th of April, and made an assignment for the benefit of his creditors. On the 18th of that month the defendants wrote to the plaintiffs, stating that they could not under the peculiar circumstances of the times confirm the credit which their agent had allowed to Bradford. The plaintiffs, notwithstanding, drew a bill on the defendants for the £3,000, which was presented for acceptance and dishonored. Suit was thereupon instituted by the plaintiffs for the breach of the agreement to accord a credit. The argument on behalf of the defendants was that if there was a right of action it could only be enforced by Bradford. He was the person from whom the consideration moved, the person with whom the engagement was made, and the only person beneficially interested. Shaw, C. J., said, in delivering the opinion of the court, there were two questions. 1st. Whether the transaction constituted a contract in which the plaintiffs had an interest; and next, whether their interest was of such a nature that they could maintain an action. It had been alleged that the immediate parties to the contract were the defendants on the one side, and Bradford on the other, and as he might undeniably recover for the breach it could not be a cause of action to any other person. It was taken for granted in this argument that an instrument could not be binding as between the original parties, and also between one or both of them, and others who intervened at a later period.

This assumption was however much too broad and unlimited, and many instances to the contrary might be found in the ordinary course of business. A bill of exchange was a contract with the payee that the bill should be paid by the drawer; and with the drawee to reimburse him. So where money was deposited by A. in the hands of B.

for the use of C., the latter might have an action on the implied privity of contract growing out of the deposit; *Lily v. Hayes*, 5 Ad. & E. 548. *Hall v. Marston*, 17 Massachusetts, 375; but if he refused to take the money, B. was under an obligation to pay it back to A. In the case before the court, there was a contract between Bradford and the defendants, in the fulfilment of which the plaintiffs had a beneficial interest. This was enough under the laws of Massachusetts to give the plaintiffs a right to an action against the defendants. But if the English law was different, as the opinions read during the argument seemed to indicate, the case must still be governed by the *lex loci contractus*.

The principle asserted by the court is well established, but there may be reason to doubt the soundness of the application. The promise was made to Bradford, not to the plaintiffs; and they did not part with value or change their position for the worse on the faith of the promise. The case was therefore as unlike *Pillans v. Van Mierop*, as it was to *Mason v. Hunt* (ante). Nor were they entitled to recover under the authority of *Lawrason v. Mason*. The contract there was solely with the vendor; and the letter a means of enabling the purchaser to obtain a credit, which might have been recalled at pleasure, before it was acted on by the vendor. In *Carnegie v. Morrison*, Bradford was the contracting party, and the plaintiffs claimed indirectly through him. It seems to have been thought by the Chief Justice, that one who is a stranger both to the promise and the consideration may maintain an action if he is interested in the fulfilment of the contract. To make this proposition applicable the beneficial interest must be exclusively in the plaintiff, and no other have a right of action for the breach. *Blymire v. Boistle*, 6 Watts, 182; *Warren v. Batchelder*, 15 New Hampshire, 129; *Edmunston v. Penny*, 1 Barr, 334 (ante, 170). Otherwise the promisor, might, as Sergeant, J., clearly pointed out in *Blymire v. Boistle*, be compelled to respond twice in damages for the same default. It is no doubt true that the drawer of a bill contracts with the payee, that the drawee shall pay, and with the drawee to reimburse him if he does; but then the latter obligation does not take effect until the former is at an end. There cannot therefore under these circumstances be two judgments in favor of different persons for the same breach. All that the case of *Lilly v. Hays*, 5 A. & E. 548, which was also relied on, establishes is that money may, though not earmarked, pass like other chattels, by delivering to a third person who receives it as a bailee or agent for the donee. The transaction is really a bailment not a contract, and the alleged promise a legal fiction, devised in furtherance of the design (ante, 172). Moreover the consideration is executed not executory, and the obligation to refund the money does not attach until the obligation to pay it over is at an end.

The rule which confines the right of action on a contract to the parties, is not merely technical, but one of essential reason; *Birkhead v. Brown*, 5 Hill, 634; and we may doubt whether the departure from it in *Carnegie v. Morrison*, conduced to the ends of justice. Bradford became a bankrupt, and as such unable to fulfil his promise to cover the bills at maturity. This might not have been a bar to a suit in his name for the breach of the promise to accept, but would seemingly have been admissible in mitigation of damages and under the doctrine of mutual credit, 2 Smith's Leading Cases, 374, 6 Am. ed. In holding that a third person was entitled to enforce the promise, notwithstanding the failure of the consideration on which it was based, the court gave the form and effect of a promissory note to a contract having none of the characteristics of such instruments *Birkhead v. Brown*, 5 Hill, 643, 646, 2 Denio. 375; *Johnson v. Collings*, 1 East, 98, 104. A promise to accept bills or open a credit in any other form, in consideration of a promise to make consignments or remittances, is a contract of mutual obligation, and the inability of either party to fulfil his part, should discharge the other in equity if not at law. The insolvency of the borrower may consequently be a reason why the lender should not make an advance, which will manifestly not be secured or paid as the terms of the contract require. And a third person cannot well be in a better position than the parties, unless he is a purchaser for a valuable consideration and without notice. In such cases time is equivalent to money, and if the plaintiffs had agreed to give Bradford time they might have enforced the contract against the defendants. But the mere existence of an antecedent debt is not a consideration for a promise other than the law implies, that it shall be paid on demand by the debtor (ante, 204). A direct engagement to pay the debt of Bradford, would not have been binding without some new consideration, such as forbearance or the acceptance of the new promise in satisfaction. Still less could the defendants be bound indirectly through a promise to him for which they received no consideration. It is only in the negotiation of bills and notes that a transfer as collateral security, for a past indebtedness operates as a purchase for value, 2 Leading Cases in Equity, 3 Am. ed. 105; *Twelves v. Miller*, 3 Wharton, 485. The rule is peculiar to negotiable instruments, and contrary to the general course of jurisprudence. *Petrie v. Clark*, 11 S. & R. 377 (ante, 225). The doctrine advanced in *Pillans v. Van Mierop*, 4 Burrows (ante, 322), that a mercantile or written contract may be valid without a consideration, is now universally abandoned. *Archer v. The Bank of Ireland*, 11 M. & W. 383, 389.

In *Carnegie v. Morrison*, a letter from an agent to his principals reciting the obligation into which he had entered on their behalf with a third person, was held to be evidence of a contract with the latter

which his creditors were entitled to enforce by suit. It would be difficult to carry the doctrine, that form is only essential as it affects the substance, further than in this instance. There is a point, however, beyond which this latitude of interpretation cannot go consistently with well established principles. To treat every promise in which others are interested, as a contract with them that it shall be performed, would enlarge the boundaries of obligation indefinitely and result in confusion and injustice. A contract with A. obviously ought not to be interpreted as a promise to B., unless it was so intended by both the contracting parties.

In *Birckhead v. Brown*, 5 Hill, 634, the plaintiffs were in business at Rio de Janeiro, as co-partners under the name of Birckhead & Co., and the defendants were co-partners in trade in the City of New York, under the name of Brown Brothers & Co., and W. & J. Brown & Co. were a commercial house doing business in Liverpool. Smith & Town were merchants in the City of New York, and James Demarest was their agent at Rio de Janeiro, where he purchased and shipped hides on their account. The defendants, at the request of Smith & Town, wrote the following letter, which, though addressed to W. & J. Brown & Co., at Liverpool, was delivered to Smith & Town, and intended to be used in their behalf by Demarest :

“NEW YORK, *June 13, 1834.*

Messrs. W. & J. BROWN & Co., Liverpool :

GENTS :—At the request of our mutual friends Messrs. Smith & Town, and on their account, we beg leave to open a credit for £10,000, say ten thousand pounds sterling uncovered at any one time, in favor of Mr. James Demarest, to be negotiated by him in Rio de Janeiro by drafts on you at sixty days' sight. This credit to expire on the 31st December, 1835. You will of course keep Messrs. Smith & Town advised as the credit is used, and they will attend to placing you in funds. We are, gentlemen,                      Your ob't serv'ts,

BROWN BROTHERS & Co.”

This letter was sent by Smith and Town to Demarest, who, in pursuance of it, drew three bills of exchange on Messrs. W. and J. Brown & Co. of Liverpool, in favor of the plaintiffs, and the jury found that the plaintiffs took and paid for the bills on the faith of the letter, which was exhibited to them by Demarest. The bills were negotiated by the plaintiffs, and presented for acceptance, which was refused by the drawees. They were then taken up by the plaintiffs, who brought suit against the defendants on the implied agreement which was alleged to arise in favor of every one who gave value in accordance with the terms of the credit. The opinion of the court was delivered by Bronson, J., who said that when such letter was addressed to all persons, it



was in effect a request made to each and every one of them, and if any individual did what was desired, that which was indefinite and at large became definite and fixed. A contract arose between him and the writer of the letter, and it was thenceforth the same thing in legal effect as though his name had been inserted from the beginning. The principle was undeniable, and it was unnecessary to inquire whether it had not sometimes been applied when there was no real privity of contract. When, however, such a letter was addressed to an individual, he alone was entitled to accept and act under it, and no one else could by thrusting himself forward acquire a right which the contract was not meant to confer. If the letter was used or exhibited by the holder as a means of obtaining credit, and third persons were thereby induced to advance money or make sales, there was still no direct communication between them and the writer, and no privity of contract on which an action could be sustained. *Rollins v. Bingham*, 4 Johnson, 476; *Walsh v. Bailie*, 10 Id. 180. The letter on which the suit was brought was of this latter description. It was addressed to N. and J. Brown & Co. of Liverpool, with them, and with them alone the defendants proposed to contract, and if they had made advances or accepted bills on the faith of the letter, the defendants would clearly have been liable to them for compensation. But there was nothing to indicate that the defendants were to be answerable to third persons, if Brown & Co. refused to open the credit or failed to make it good. The only reasonable conclusion from the evidence was that the contract was limited to the parties between whom it was in point of fact made. The plaintiffs were not requested to give a credit to Smith & Town by taking their drafts or in any other form. They were consequently mere volunteers, and could only sue upon the contract to which they were parties, viz.: the bills of exchange. The case of *Russell v. Wiggin* had been relied upon as an authority for the plaintiffs. It might be questioned whether the court did not go too far there, and in *Carnegie v. Morrison*, in holding that a promise to one man conferred a right of action on another. In both instances there was, however, a promise to accept and pay the bills, whereas in that under consideration the defendants did not enter into such an agreement with any one, and merely requested Brown & Co. to open a credit with an undertaking to keep them indemnified. If letters of credit and guarantees were viewed as negotiable instruments in Massachusetts, they bore no such character in New York. The plaintiffs had failed to make out their case, and the judgment which had been rendered in their favor must be reversed.

It is not easy to form an opinion on a point of so much nicety. If the letter to W. and J. Brown & Co. was merely a request it could not operate as a contract with persons to whom it was not addressed. If, on the other hand, it was intended, as the delivery of it to Smith &

Town would seem to indicate, as an agreement with them that Brown & Co. would accept bills drawn on their account at sixty days to the extent of £10,000, it might be fairly inferred that the intention also was that they should use it as a means of inducing third persons to give value for the bills when drawn, and the case would then be clearly within the principle announced in *Lawrason v. Mason and Russell v. Wiggin*.

A similar view was taken in *Jones v. Carter*, 8 Q. B. 134. The defendant was the treasurer of the "Derby Lottery," and issued tickets to the subscribers; the agreement being that if the horse whose name appeared on the ticket won, or came in second, the holder should receive a prize. One James bought a ticket marked "Joanna," and transferred it to the plaintiff before the race. Joanna proved to be the second horse, and the plaintiff brought assumpsit for money had and received, on the ground that the ticket operated as an appropriation of so much of the fund in the hands of the defendant to his use. Lord Denman said, that the contract was not with the plaintiff, but with the person from whom the plaintiff bought. The plaintiff could not, therefore, by contracting with him, acquire a right as against the defendant. There was no privity between the parties, and the non-suit which had been entered at the trial must be sustained.

In the subsequent case of *Gerhard v. Bates*, 2 Ellis & Bl. 476, the declaration alleged that the defendant was a promoter and director of a mining company, the capital of which was divided into 12,000 shares, and in that capacity guaranteed and promised to the bearers of the same, a minimum half-yearly dividend of 33 per cent. payable half-yearly, and it was then averred that the plaintiff, confiding in the promise of the defendants, became and was the purchaser of 2,500 of the said shares, at 12s. 6d. each, but the defendant had not paid, or caused to be paid, to the plaintiff, the aforesaid dividend of 33 per cent. This count was held bad on demurrer, as showing neither privity of contract nor consideration. The promise was to guaranty the bearers, and not those who might thereafter buy the stock. Nor did it allege that the plaintiff had bought at the request of the defendants.

It is, however, generally conceded, that a liability in tort has a wider range in this respect, than a liability in contract. *Langridge v. Levy*, 2 M. & W. 519; *Thomas v. Winchester*, 2 Selden, 416. If a letter is written with a fraudulent design of enabling the bearer to obtain credit from third persons, it will not be a defence that the letter was not addressed to the party who seeks to recover for the fraud. *Allen v. Addington* 7 Wend. 10; 11 Id. 375; *Weatherford v. Fishback*, 3 Selden, 170; 1 Smith's Leading Cases, 451, 6 Am. ed.; 2 Id. 177. A man who alleges publicly by advertisement, that the shares of an in-

corporated association or body corporate have a certain value, without having any sufficient ground for the assertion, will be liable in an action on the case, to any one who is thereby induced to become a purchaser of the stock. *Gerhard v. Bates*, 2 Ellis & Bl. 476, 489; *Wontner v. Shairp*, 4 C. B. 404. It is not necessary to prove that the plaintiff read or was influenced by the advertisement; this may be presumed from his having pursued the course it was intended to induce; *Wontner v. Shairp*; *Watson v. The Earl of Charlemont*, 12 Q. B. 851, 864. "If," said Coleridge, J., in *Watson v. The Earl of Charlemont*, "an advertisement is put forth to induce persons to enter into a certain contract, and an individual does afterwards enter into such a contract, it is no part of his case to show that he was cognizant of the advertisement."

Whatever may be thought on these points, it is clear that where, as in the case of a guarantor or surety, the consideration does not move to the promisor, and he is bound solely by the contract, a close adherence to the letter is the only safe guide. *Birkhead v. Brown*, 5 Hall, 634. An authority to draw, consequently, will not be binding, either as a virtual acceptance, or promise to accept, unless it is strictly pursued. *The Michigan State Bank v. Leavenworth*, 2 Williams, 209; *Lewis v. Kramer*, 3 Maryland, 265. A promise to accept bills payable after sight, will not extend to bills payable after date; *The Ulster County Bank v. McFarlan*, 5 Hill, 432; 3 Denio, 553; nor will a letter authorizing a draft at sixty days, bind the writer to pay a draft at ninety, though giving him a longer credit. *Birkhead v. Brown*, 5 Hill, 634; 2 Denio, 375. So if the authority fails to specify the place of payment, the bill must seemingly be made payable at the abode or place of business of the drawee, and he will not be liable for a refusal to accept an instrument requiring payment at a distance, or within the confines of another State. *The Michigan State Bank v. Leavenworth*; *Lawrence v. Barker*, 5 Wheaton, 101 (ante, 330).

We may now turn to another branch of the subject. When a man agrees, generally in writing, to be answerable for the payment of a note or bond, without saying to whom, and delivers the instrument to a purchaser for value, the latter acquires a right which he may enforce against the guarantor. That is certain which may be made so, and the ambiguity arising from the failure to designate the promisee, disappears on reading the contract in connection with parol evidence. A guaranty without address, said Gaselee, J., in *Walton v. Dodson*, 3 C. & P. 162, "will enure to the benefit of him to whom or for whose use it is delivered." When, however, such a guaranty is given by a third person, with a view of enabling the holder to get a higher price for the instrument than could be obtained on the unaided credit of the maker or obligor, a question arises not unlike that which we have been considering. It

may be said on the one hand that an agreement is the meeting of the two minds, to make a promise valid there must be a promisee, and that a contract which is not binding for want of parties, cannot be made good by the subsequent intervention of a third person. There is room, on the other hand, for the argument which was urged with so much force by Story, in *Russell v. Wigen* (ante, 345), that a man who gives a written promise with a view of enabling him to use the instrument as a means of obtaining credit, will be as much bound to a third person who parts with value on the faith of the writing, as if he stood by and repeated the assurance. *McDoal v. Yeomans*, 8 Watts, 361, 363.

Here, as on the cognate question of a promise to except a non-existing bill, the course of decision in England and the United States diverged, and the courts of this country arrived at results which are not in strict conformity to the rules of the common law. The germ was, however, planted in both instances by an English judge, and may be found in *Fenner v. Meares*, 2 W. & Bl. 1269. The defendant, Meares, borrowed £1,000 on *respondentia*, giving at the same time a written declaration that if the bond was assigned, it should be paid in full to the assignee without deduction or abatement. The motive for this undertaking was to enable the obligee to dispose of the bond to better advantage by precluding a set off by Meares. The plaintiff having taken an assignment of the bond, brought assumpsit on the collateral agreement. It was held by a majority of the court, with some hesitation on the part of Blackstone, J., that the action was well conceived, and founded on a sufficient consideration. There was a promise to pay any person who might hold the bond, on the faith of which the plaintiff had given value. This decision was approved in *Israel v. Douglass*, 1 H. Bl. 229, but when a similar question arose in *Johnson v. Collings*, 1 East, 10, Lord Kenyon expressed a decided disinclination to any doctrine tending to make *choses in action* assignable, and Lord Ellenborough, observed, in *Williams v. Everett*, 14 East, 383, 387, he had read *Fenner v. Meares* twice, and would have to read it again before he assented to it.

It has never been followed on the very point in England, but it is now as well settled there as it is in the United States, that an assignment of a debt ratified by a promise from the debtor, will confer a legal right; *Israel v. Douglass*; *Walker v. Rostron*, 9 M. & W. 411; *Griffin v. Weatherby*, 3 Q. B. L. R. 753; and the case is certainly not less strong when the promise precedes the assignment and is relied on by the assignee. In *Cross v. The Trustees*, 5 Hill, an agreement by and between a number of persons, to pay the amount set opposite to their names to such trustees as they should thereafter elect, was held to entitle the trustees, when subsequently chosen, to compel the payment of the amount subscribed, and although a different result was reached

under similar circumstances in *Stewart v. Trustees*, 2 Denio, 405; 1 Comstock, 581 (ante, 184); it was for an alleged want of consideration, and not because the agreement did not designate the parties. "A difficulty is made," said Cowen, J., in delivering the opinion of the court below, "on the promisees being prospective; and it is supposed that though, if the trustees had been named, they might have sued, yet no promise can be available in the names of the persons thereafter elected. The answer is, that election was a mere mode which all parties agreed upon for designating the promisees. I am dealing with A., and, in consideration of goods sold to me, I gave him my stipulation to pay the price to such persons as he shall name. He afterwards names the payee, who adopts his act and claims the money. That makes a perfect and binding contract between me and the person so designated (*Watson's Ex'rs v. McLaren*, 19 Wend. 557, 565, 566)." It is by virtue of this principle that a right of action may accrue to an individual under an assumpsit to all the world, or an advertisement offering a reward to the public (ante, 338, 340).

A recovery may accordingly be had upon a guaranty in which the plaintiff is not named or designated, and which was not delivered to him or specifically for his use, by the guarantor. *Watson's Ex'rs v. McLaren*, 19 Wend. 557; 26 Id. 425; *Nevins v. The State Bank*, 10 Michigan, 547.

The judgment of Mr. Justice Story, in *Russell v. Wiggin*, is distinguished for breadth and cogency of argument, and it was followed by the English courts in the recent case of *In re Agra and Masterman's Bank*, 2 Law R. Chancery Appeal Cases, 391, which was a bill in equity, filed under the following circumstances. On the 31st of October, 1865, the Agra and Masterman's Bank gave Dickson, Tatham & Co., the following letter of credit:

"You are hereby authorized to draw upon this bank, at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honor on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to endorse particulars on the back hereof. The bills must specify that they are drawn under credit, No. 394, of the 31st of October, 1865."

In May, 1866, Dickson, Tatham & Co., drew bills on the Agra and Masterman's Bank, under this letter, for £6,000, and sold them to the agent of the Asiatic Banking Corporation, who duly endorsed particulars on the letter of credit. The Agra and Masterman's Bank stopped payment before the bills were presented for acceptance, and the question was whether they were liable to the holders on the letter of credit. Sir G. J. Turner, L. J., said, the Agra Bank had held out an assurance to the persons negotiating the bills, a promise that they would pay the

bills; and it would be impossible, according to any view of the doctrines of courts of equity, to allow the bank, after having sent that letter into the world, addressed to the persons who were to negotiate the bills, and so held out to them that it would be answerable for their payment, to say that because there was a debt due to it from the persons to whom it had given the letter of credit, therefore it would not pay the bills.

Sir H. M. Cairns concurred in this opinion. If it were necessary to determine the question of the legal liability of the Agra and Masterman's Bank, he would be of opinion that, upon the offer in the letter being accepted and acted on by the Asiatic Banking Corporation, there was constituted a valid and binding legal contract against the Agra and Masterman's Bank, in favor of the Asiatic Banking Corporation. The cases as to the offer of rewards, of which the case of *Williams v. Carwardine*, 4 B. & Ad. 621, was an example, followed by the somewhat analogous cases of *Denton v. Great Northern Railway Company*, 5 E. & B. 860; *Warlow v. Harrison*, 1 E. & E. 295, 309; and *Scott v. Pilpington*, 2 B. & S. 11, appeared to him to be a sufficient authority to show that there might be privity of contract in such a case; and if the view was adopted which appears to have been taken in the American courts, that the holder of the letter of credit was the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road.

But assuming the contract to have been at law a contract with Dickson, Tatham, & Co., and with no other, it was clear that the contract was in equity assignable, and that Dickson, Tatham & Co. must be taken to have assigned (if assignment were needed) to the Asiatic Banking Corporation, and to have been by the writers of the letter intended to assign to them, the engagement in the letter providing for the acceptance of the bills. Generally speaking, a chose in action, assignable only in equity, must be assigned subject to the equities existing between the original parties to the contract; but this was a rule which must yield when it appeared from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.

The essence of the letter was, as it seemed to him, that the person taking bills on the faith of it, was to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills which were negotiable instruments, payable according to their tenor, and without reference to any collateral or cross claims. Unless this was done, the letter was useless; Dickson, Tatham & Co. would obtain no benefit from it; the takers of the bills could obtain no protection under it. In this view of the case, the Asiatic Banking Corporation were assignees of the contract with Dickson, Tatham &

Co., free from any equities between Dickson, Tatham & Co. and the Agra and Masterman's Bank.

In *Watson's Executors v. McLaren*, a note was made payable to the order of the defendant below, Watson, and one Tuttle, and endorsed generally by them. Watson then wrote a guaranty in the most general terms on a separate paper, and delivered both instruments to Tuttle, with a view of enabling the latter to raise money on the note for the use of the makers. Tuttle obtained a loan of \$200, from Frye, who took the note and guaranty as security and subsequently transferred them to the plaintiff below McLaren. It was contended on behalf of the defendant, first, that the guaranty was void as not naming any one as promisee, and because it was not made with the plaintiff or with Frye under whom he claimed, and next, that the guaranty being on a separate paper from the note was not negotiable, and if a cause of action accrued under it to Frye, he could not transfer it to the plaintiff. Cowen, J., said, the guaranty was evidently intended by the defendants to travel with the promissory note, and secure whomsoever might take and hold it on the faith of the guaranty. It contained all the usual requisites, except the name of the party guaranteed, which could not be introduced, because as yet he was not known. Finally, however, Frye, came forward. He advanced the money and took the paper. There was no difficulty in saying that he thereby acquired a right to enforce the guaranty by suit. The failure of the writing to express a name was immaterial, at least so far as Frye was concerned. It was the obvious intent of the defendant below, to indemnify any man of the whole community, who should lend money on the credit of the note and especially on the credit of the guaranty. Frye did so with full notice to the defendant; and the previous floating promise then took shape as a direct one to him, and might be declared on as having that legal effect. By executing the guaranty with intent that the makers should obtain money upon it from any quarter where it could be had, the defendant made them his agents to go in person or by Tuttle, to Frye or any other person who had the requisite means; and when Frye in compliance with their request made the loan, the guaranty became as binding in his favor as if his name appeared in it, or it had been delivered in the first instance to him.

The court were, however, as clearly of opinion, that such contracts were not negotiable. When Frye gave value on the faith of the guaranty, the right of action became fixed in him, and did not pass when the note was subsequently transferred to the plaintiff. The latter acquired an equitable interest, which he might enforce by a suit in the name of Frye. If the guaranty had been written on the note it might have operated as a qualified endorsement waiving demand and notice, but it was well settled that to render an endorsement valid, it

must be on the instrument itself, or on a paper annexed to it, and known as an *allonge*. A separate guaranty of a negotiable note or bill, could not therefore like an acceptance or endorsement run with the principal obligation, but must end where it begun (*ante*, 229).

This view was affirmed by the Court of Errors, and is in accordance with the general current of decision, which establishes that a guaranty will not pass to a subsequent holder of the instrument guaranteed, even when the latter is negotiable, unless the guarantee is written on and forms part of the instrument itself; *McDoal v. Yeomans*, 8 Watts, 361, 363; *Beckley v. Ecker*, 3 Barr, 392; *Ten Eyck v. Brown*, 4 Chandler, 151; *Gallagher v. White*, 31 Barb. 92. In *McDoal v. Yeomans*, Gibson, C. J., said, that it might at first appear that the law would interpret a general guaranty of a note payable to bearer, as a several promise, to each successive holder, who gave value for the instrument in reliance on the guaranty. The answer to this argument was that collateral contracts of this nature are not exempted by the law merchant or the statute of Anne, from the general rule which forbids the assignment of a chose in action. This was equally true whether the guaranty was written on a separate paper or endorsed on the note. It had been contended that the plaintiff should, until the contrary appeared, be presumed to be the first taker in whom the right to enforce the guaranty vested. This presumption could not, however, be indulged without proof in favor of one whose duty it was to make out his case.

This decision is contradicted on the latter point by *Nevins v. The State Bank*, 10 Michigan, 547, where the plaintiff was held to be entitled to a verdict on producing the guaranty and note, without showing that they came direct to his hand from those of the maker or guarantor. The opinion expressed on the former point, that a guaranty will not operate as an endorsement, even when written on the note, would seem to be true only where the guaranty is as it was in *McDoal v. Yeomans*, that the instrument may be collected by the use of due diligence, and not that it shall be paid when due. See *Watson v. McLaren*, 19 Wend. 557; 26 Id. 425, 457. An endorsement is impliedly a guaranty; a guaranty may, therefore, take effect as an endorsement.

In *The Michigan State Bank v. Leavenworth*, 2 Williams, 209, the court held that the operation of a letter of credit is confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death. See *Campanari v. Woodburn*, 15 C. B. 400. The case was decided in obedience to the general principle, that a recovery cannot be had for an act done after the death of the person whose estate is sought to be charged, in pursuance of a request or authority made or given during his life. In *Campanari v. Woodburn*, 15 C. B. 400, the plaintiff alleged that it was agreed between him and the defendant's intestate, that he should endeavor to



sell a certain picture; and that if he succeeded the intestate should pay him £100; that he did so endeavor while the testator was alive, and through the efforts then made was enabled to effect a sale after the testator's death, but that the defendant had refused to pay the £100. The count was held not to show a cause of action. Jervis, C. J., said, that if the testator had countermanded the sale, he clearly would not have been liable for commissions, although the plaintiff might have recovered for services already rendered and charges and expenses previously incurred. *A fortiori* to the defendant was not responsible when the revocation proceeded from the act of God.

The rule has been held to apply even where the party is ignorant of the death of the principal, and proceeds in good faith under the authority given during his life. *The Michigan State Bank v. Leavenworth*, 2 Williams, 209, 216 (ante, vol. 1, notes to *Hunt v. Rousmanier*). In *The Michigan State Bank v. Leavenworth*, a letter of credit authorizing another to draw for a certain amount, and during a limited time, was accordingly said to be revoked by the decease of the giver, although the person to whom and for whose security the letter was delivered had no notice of the death, and the period for which the credit was given had not expired. There are cases, however, which follow the just and equitable doctrine that a revocation dates from the time when it is made known to the parties interested. A man, obviously ought not to refuse compensation for an act done at his request, on the ground of a change of purpose which was not communicated. This is generally conceded when the revocation is express, and would seem to be equally true when it follows as a conclusion of law from the bankruptcy, converture, lunacy, or death of the principal. *Cassiday v. McKenzie*, 4 W. & S. 282; *Ish v. Crane*, 8 Ohio, N. S. 320; 13 Id. 574; *Dick v. Page*, 17 Missouri, 234. "If," said Rogers, J., in *Cassiday v. McKenzie*, "a man is the notorious agent for another to collect debts, it is but reasonable that debtors should be protected in payments to the agent, until they are informed that the agency has terminated. But this, it is said, is only true of an agency terminated by express revocation, and does not hold, of an implied revocation by the death of the principal. It would puzzle the most acute man to give any reason why the payment should fail when revoked by death, and be good when expressly revoked by the party in his lifetime."

In the subsequent case of *Ish v. Crane*, a sale of land made in ignorance of the death of the principal, was upheld for a like reason. The question arose on a bill in equity, filed to enjoin the heirs of the vendor from proceeding at law. Sutliff, C. J., said, that "if, as between principal and agent, the authority ceased with the life of the principal, a different rule prevailed as to third persons who relied on the credit given to the agent, and were entitled to presume that it had not been

withdrawn. It might be true that a deed or other act done in the name of a dead man was void. But the complainant had bought and paid for the land in the belief that the powers of the agent were unchanged. He had an equity therefore growing out of his own acts which he was entitled to enforce independently of the deed." It follows that an advance, on the faith of a letter of credit or general guaranty, after the death of the writer, and before it is known, will confer a right that may be enforced against his estate. See 2 Smith's Leading Cases, .500, 6 Am. ed.

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DISCHARGE OF SURETY.

PAIN AGAINST PACKARD IMPEADED WITH MUNSON.

Supreme Court, New York.

MAY TERM, 1816.

[REPORTED, 13 JOHNSON, 174-5.]

*If an obligee, or holder of a note, who is requested by the surety, to proceed without delay collect the money of the principal, who is then solvent, neglects to proceed against the principal who afterwards, becomes insolvent, the surety will be exonerated.*

*In an action against A. and B. on their joint note, payable to C. on demand, A. pleaded that he signed the note as surety for B., and requested C. to proceed immediately to collect the money of B., who was then solvent; but C. neglected to proceed against B. until he had become insolvent, and had absconded, whereby the money, as against B., was lost. On demurrer, this was held to be a good plea in bar of the plaintiff's action against A.*

THIS was an action of assumpsit, on a promissory note made by Packard and Munson, in which Packard alone was arrested, the other defendant being returned not found. The defendant Packard pleaded: 1. Non-assumpsit. 2. That he signed the note, which was for 100 dollars, payable on demand as surety for Munson; that he urged the plaintiff to proceed immediately in collecting the money due on the note from Munson, who was then solvent;

and that, if the plaintiff had then proceeded immediately to take measures to collect the money of Munson, he might have obtained payment from him ; but the plaintiff neglected to proceed against Munson until he became insolvent, absconded, and went away out of the State, whereby the plaintiff was unable to collect the money of Munson. 3. The third plea was like the second, except that the defendant alleged a promise, on the part of the plaintiff, that he would immediately proceed to collect the money of Munson, and a breach of that promise, by which the defendant was deceived and defrauded, and prevented from obtaining the money from Munson, &c.

There was a demurrer to the second and third pleas, and a joinder in demurrer, which was submitted to the court without argument.

PER CURIAM. The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of *The People v. Jansen* (7 Johns. Rep. 336), will warrant and support this plea. We there say, a mere delay in calling on the principal will not discharge the surety. The same principle was fully and explicitly laid down by the court, in the case of *Tallmadge v. Brush* (not reported). But this is not such a case. Here is a special request, by the surety, to proceed to collect the money from the principal ; and an averment of a loss of the money as against the principal, in consequence of such neglect. The averments and facts stated in the plea are not repugnant or contradictory to the terms of the note. The suit here is by the payee against the makers. The fact of Packard having been security only, is fairly to be presumed to have been known to the plaintiff. He was, in law and equity, therefore, bound to use due diligence against the principal, in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said, the surety might have paid the note and prosecuted the principal ; but although he might have done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceeding against the principal, and chose to rest on that, he might do so. In the case of the *Trent. Nav. Co. v. Harley* (10 East, 34), the plea was similar to the present, and not demurred to. The defendant must, accordingly, have judgment on the demurrer.

Judgment for the defendant.

## KING AGAINST BALDWIN AND FOWLER.

Case in Chancery, in New York.

SEPTEMBER, 1817.

[REPORTED, 2 JOHNSON'S CHANCERY REPORTS, 554-563.]

*Mere delay of the creditor to call on the principal debtor for payment, will not discharge the surety.*

*But if the creditor, by express agreement with the principal, varies the terms of the contract, by enlarging the time of performance, without assent of the surety, the latter is discharged.*

*A surety, on paying the debt, is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal.*

*The rules for the relief of the surety are the same at law as in equity, when the facts are the same in both courts. And where a surety who has been sued at law, makes his defence, which is overruled as insufficient, he cannot, afterwards, on the same facts only, obtain relief in equity.*

The defendant Fowler, being indebted to the defendant Baldwin, on the 10th of October, 1806, in the sum of 332 dollars and 89 cents, he, together with the plaintiff, as *his security*, executed a promissory note for that sum to Baldwin, payable on demand, with interest. In 1809, F. obtained his discharge under the insolvent act, and, in 1812, B. brought an action, on the note, against the plaintiff, who pleaded the general issue, and gave notice that he should prove, at the trial, that the debt, for which the note was given, was due from F. to B., and that the plaintiff was merely surety; that F. was solvent and responsible long after the note was given; that the plaintiff informed B. of the failing circumstances of F., and urged him to collect the money of F., which B. refused to do. This special ground of defence was overruled by the judge, before whom the cause was tried, and a verdict was found for B. against the plaintiff K. for 459 dollars, on which judgment was rendered. The bill stated that the plaintiff consented to be security for F. for one year only; and that B. received money from F. for forbearance; and that part of the sum included

in the note was not due from F. to B.; but these facts were denied by B. and F., in their answers; and the depositions did not substantiate the allegations of the plaintiff.

It was proved that the plaintiff had frequently urged B. to sue F., and that B. said that he believed F. was an honest man, and he would not trouble him; that he would as soon lose his debt as prosecute him for it.

*Burr*, for the plaintiff, contended that there was evidence of such neglect and refusal by B. to take any measures to collect the money of F., or such collusion with him as would discharge the plaintiff from his liability, as *surety* of F. That B. was bound to use diligence to obtain payment of the note from F., especially after application to him for that purpose by the plaintiff; and that giving time to the principal debtor discharged the surety; as the creditor had no right to increase the risk of the surety without his consent; He cited 2 Bro. C. Rep. 579; 2 Vesey, Jun., 540, 544; Tothill's Rep. 280; Nelson's Ch. Rep. 9; 3 Atk. 91; 10 East, Rep. 34, 38; 14 Vesey, Rep. 168, 170; 20 Viner, Ab. 104; Kirby's Rep. 397.

*D. B. Ogden*, contra, insisted that there was no general principle in law or equity, that the mere delay of the creditor to sue the principal debtor would discharge the surety. The equity of each case must very much depend on its special circumstances. That the doctrine contended for by the plaintiff was applicable only to *sureties* for the performance of *duties* or *trusts*. That no day of payment was fixed. The defence of the surety, if any he had, was good at law (*The People v. Jansen*, 7 Johns. Rep. 332), and there was sufficient evidence of the facts on which relief was now sought in this court. All the allegations in the bill were denied or disproved, except the fact that the plaintiff became surety for B.; and it was not competent to the plaintiff to prove the contract different from the terms of the note.

THE CHANCELLOR. The allegation in the bill that the note was procured by fraud, is denied in the answer, and not supported by proof. It is equally denied, and is without proof, that the plaintiff had offered payment of the note. The plain state of the case is, that in October, 1806, Fowler, with the plaintiff as his surety, gave Baldwin a note, payable on demand, and that the note was fairly and freely given, and for a sum then actually and bona fide

due. The testimony establishes these facts beyond any reasonable doubt. This note was put in suit at law in 1812, and a recovery had against the plaintiff; though he had set up in his defence the same matters of fact on which he now seeks relief in this court.

Perhaps it would be sufficient to rest the objection to the plaintiff's claim to relief here on the trial and recovery at law. He has made his defence to a recovery on a note before a court of competent jurisdiction, upon the same facts that he now puts forward, and that defence was overruled as insufficient. It was observed by the present chief justice, in delivering the opinion of the Supreme Court in the case of *The People v. Jansen* (7 Johns. Rep. 332), that there was nothing in the nature of a defence by a surety to make it peculiarly a subject of equity jurisdiction; and that whatever would exonerate the surety in one court ought also in the other. The facts being ascertained, he observed, the rule must be the same in that court as in the Court of Chancery; and this was, undoubtedly, the opinion of Lord Loughborough, in the case to which the chief justice refers.

But the cause has been investigated and discussed here upon its merits, and I am willing to consider it in that light.

It is admitted, that the plaintiff signed the note as surety for Fowler, and the only ground for relief is, that Baldwin neglected and refused to prosecute Fowler, though repeatedly pressed by the plaintiff, until F. had become insolvent, and unable to pay. Several witnesses, on the part of the plaintiff, testify, that Baldwin often declared that he would not sue F., if he lost his debt; and that he had refused to take part of the debt from the plaintiff. There are witnesses, on the other hand, who declare that Baldwin made repeated unsuccessful applications to F. and the plaintiff for the money. There are, likewise, some sayings of Baldwin, as testified to by Wm. Brown, from which an inference has been attempted to be drawn, that F. paid money to Baldwin for forbearance; but the testimony is too loose for any safe deduction; and the same observation will apply to much of the testimony respecting declarations of Baldwin. There is nothing more dangerous than to impair the force and effect of solemn contracts in writing, by careless, idle, and perhaps unmeaning conversations; and as far as such testimony is in contradiction to the language of the note itself, it is utterly inadmissible.

It will not be pretended, that Baldwin was bound to accept of any partial payment from the plaintiff, even if any such was

offered, and the question is, whether the omission to prosecute Fowler, though requested by the plaintiff to do so, was a discharge of the plaintiff. This is certainly not the common understanding on this subject. It would lead to a great deal of imposition and fraud, if sureties in an obligation for the payment of money could discharge themselves, merely on the ground of the delay or indulgence of the creditor, or by artfully seizing on unguarded remarks in conversation (perhaps intentionally drawn forth), expressive of a humane and determined indulgence. I am persuaded there is no rule of equity which goes so far. There are some notes of cases mentioned in Tothill (279, 280), in the time of James I., in which it would seem that the surety in an obligation had been relieved, where the bond was continued for several years, without his privity. But the note of the cases is so very imperfect, and so destitute of facts and circumstances, as to be altogether unfit to serve as a guide, and unworthy to be cited as authority. Thus, for instance, the case of *Saunders v. Smith & Churchill* is mentioned as containing the decision that "a surety was relieved where a bond was continued in use, without his privity, he thinking the same to be paid;" but, at the bottom of the page, we find the same case stated more at large, from which it appears, that though the bond was continued for several years, when the surety supposed it had been paid, and it was then put in suit against the surety, the relief was only granted against the heir of the principal debtor, in consequence of his having sufficient assets. The case of *Moile v. Roberts* is also cited by Tothill, for the position, that "the heir of a surety, where the bonds were continued without the privity, of the surety was relieved." But if we examine this same case, as reported in Nelson's Ch. Rep. 9, according to Viner (vol. 20, pl. 105, pl. 3), it will be found, that the surety was sued at law, on a bond of 18 years' standing; and it appearing that the obligee had, some years before, purchased lands of the principal debtor, to five times the amount of the bond, it was presumed, from *the antiquity of the bond, that the obligee did deduct the debt out of the purchase money*, and on that ground the surety was held discharged, and the suit at law enjoined.

This explanation of two cases is sufficient to show what little reliance is to be placed upon the loose notes of Tothill, which were collected and alphabetically arranged by him, in the shape of an index, and published after his death.

The established doctrine is, that mere delay in calling on the

principal will not discharge the surety, provided that delay be unaccompanied with any settled or binding contract for that purpose. The rule was so understood by Baron Wood, on the trial of the case in 10 East, 34, and by Story, J., in the case of *Hunt v. U. S.* (1 Gallison, 32), and by the Chief Justice in the case of *The People v. Jansen*, already referred to. So in the case of *Wright v. Simpson* (6 Vesey, 734), Lord Eldon declared that he never understood that, as between the obligee and the surety, there was an obligation of active diligence against the principal. The surety was guarantee, and it is *his* business to see whether the principal pays, and not that of the creditor. The decision in the case of *The Trent. Navigation v. Harley* (10 East, 34), was founded on the same doctrine, that the mere laches of the obligee, in not calling on the principal, was not a discharge of surety. I might also refer to the case of *Peel v. Tatlock* (1 Bos. and Pull. 419) for the same purpose. All the cases of relief of surety have gone upon the ground that *time was given to the principal by contract*, without consent of the surety. The doctrine is, that the surety is bound by the terms of his contract; and if the creditor, by agreement with the principal debtor, without the concurrence of the surety, *varies these terms*, by enlarging the time of performance, the surety is discharged; for he is injured, and his risk is increased. The surety is entitled to pay the debt when it becomes due, or he may call upon the creditor, by the aid of this court, to enforce his demand against the principal debtor. On paying the debt, he is entitled to the creditor's place, by substitution; and if the creditor, by agreement with the principal debtor, without the surety's consent, has disabled himself from suing when he would otherwise have been entitled to sue, under the original contract, or has deprived the surety on his paying the debt from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged. This is the true principle to be extracted from the cases.

In *Skip v. Huey and other* (1 Atk. 91), the defendants were bound in a bond to the plaintiff, for the payment of money, and one of them was surety for the other two. The obligee, by a new agreement with one of the debtors, took notes of different persons, payable at future days, in lieu of the bond, and took, also, an agreement of the debtor to make up the deficiency, and deliver up the bond. It was held by Lord Hardwicke, that the obligee was not entitled to any relief against the surety, though the new



agreement turned out to be illusory and fraudulent. The next case I shall mention, was that of *Nisbet v. Smith* (5 Bro. 578), which lays down the rule of equity on this subject, with more fulness and precision. The bill stated, that the defendants, after obtaining judgment against one Maynard, on a bond to pay a debt from the plaintiff to the defendant, had, *by agreement stayed the execution for three years*, and the judgment was confessed under that agreement. This agreement was made without the knowledge of the plaintiff, who was considered as a surety for Maynard, the principal debtor, and relief was granted to him against the debt by a perpetual injunction. The lord chancellor said, that generally speaking, the surety might come into this court to compel the debtor to pay the debt, and the court would compel the creditor to bring his action. But as the creditor had given credit to the principal debtor, for three years longer than the bond imported, at the expense of the surety, and without his privity or consent, the surety was discharged. The same principle was recognized in *Rees v. Berrington* (2 Vesey, Jun., 540). The plaintiff in that case was surety in a bond payable by instalments in 1789 and 1790. In September, 1790, the money being all unpaid, the obligee came to an arrangement with the principal debtors, and took notes for the two instalments, payable in 1791, 1792, and 1793, and all this was done without communication with the plaintiff, and it was ruled that he was accordingly exonerated. The doctrine there laid down was, that if the condition of a bond be extended, it varied the contract and responsibility of the surety, and increased his risk. A surety does not become bound that the principal shall pay in twelve months, when he was to pay in six; and an indulgence of this nature, contrary to the terms of the original engagement, discharges the surety, if done without his consent. The surety has a right, on the day the debt is due, to come into chancery and insist on its being put in suit; and if the obligee has suspended that right, by a new agreement with the debtor, he has disabled himself to do that equity to the surety which he had a right to demand, and which the relation between the surety and debtor required. So, in *Boulton v. Stubbs* (18 Vesey, 20), the surety was held to be released, because the obligee agreed with the principal debtor to postpone his remedy, by changing his immediate right to sue into a right to call for certain instalments. Though this was declared to be done without prejudice to his security, yet it was held to be varying the contract to the injury of the surety

by depriving him of his immediate right to have the debt collected. The same special agreement with the debtor, postponing the collection of the note, existed in the case of *Deming v. Norton*, (Kirby's Rep. 397), and it was held to be a release of the surety.

The case of *The People v. Jansen*, to which I have already alluded, is certainly not in contradiction to these cases. That case was quite different from that of a bond to a private individual, who is not bound to watch over the conduct of the principal debtor. It was there the special duty, by law, of the supervisors of the county, for whose use the bond was taken, to inspect the conduct and accounts of the principal, who was a loan officer, and the surety had a right to expect and rely on the performance of that duty. It was therefore a peculiar case, and attended with very special circumstances and extraordinary laches, equivalent to an enlargement of time.

I have said, that the surety has a right, at any time after the debt is due, to apply to this court to coerce the creditor to collect his debt. All the cases speak this language. In *Nesbit v. Smith*, Lord Thurlow admitted, that the surety might apply to Chancery, for the purpose of compelling the obligee to bring his action, and that it was a common case which forced a surety into Chancery to be so relieved. So in *Rces v. Berrington*, Lord Loughborough said that "the surety had a right, the day after the bond is due, to come here and insist upon its being put in suit." It is said in 6 Vesey, 734, that he may, on indemnifying the creditor, even compel him to prove the debt, under a commission of bankruptcy. This safe and reasonable doctrine was also a part of the civil law, which allowed a surety who was in peril, to sue for his indemnity or discharge. (Dig. 17, 1, 38, 1.) There is no case, however, in the English law, in which the personal application of the surety to the creditor was held to be compulsory on the creditor, at the hazard of discharging the surety. But since the argument of this cause, I have met with a very recent decision of the Supreme Court, in *Pain v. Packard* (13 Johns. Rep. 174), which decides, that if the holder of a note is requested by the surety (being one of the joint makers), to proceed without delay, and collect the money of the principal, who is solvent, and he omits to do it, until the principal becomes insolvent, the surety will be exonerated at law. If this had been understood to be the law, when the case now below me was in the Supreme Court, I should not have been obliged to discuss it; for the same plea in the shape of a notice,

under the general issue, was offered as a defence to the action at law, and overruled, on the trial at the circuit, and the decision acquiesced in by the present plaintiff. With the utmost deference for the judgment of the Supreme Court, I cannot as yet find the evidence, that a surety was ever before held discharged by such means. When the cases all speak of the right of a surety to coerce the creditor to sue, by means of an application to Chancery, they implied, that he cannot do it by merely calling on the creditor, or by any notice to act, in pais. The cases of discharge are all founded on the fact of a *new agreement* between the debtor and creditor, *varying* the contract by which the security originally stood bound. This was the great principle of the case of Ludlow v. Simond (2 Caines's Cases in Error, 1). When the surety has ample and well settled means of relief, through the medium of a court of equity, which will at once *compel* the creditor to his duty, it is not necessary, and, as I humbly apprehend, not expedient, to introduce a new principle of action between creditor and surety. Will it not open a litigious inquiry as to the certainty and efficiency of the notice, and does not such a weapon, left at large in the hands of a surety, afford temptation to vexation, imposition and fraud? As the relief was hitherto granted, there could be no injury, misunderstanding or abuse. I feel embarrassed, between my respect for that decision, and my conviction that the previous rule was different. But I am too well acquainted with the learning, the talents and the liberality of that court, not to know, that a free discussion of legal principles is perfectly agreeable to their disposition and character; and I feel the less oppression under the weight of that authority, as the point appears not to have been argued by counsel, or elaborately discussed, and we have only a short note of the decision. In one of the cases I have referred to, Justice Story, of the Supreme Court of the United States, after examining the question with his usual diligence and ability, declares, that he can find no case, that merely delay to require payment, without any contract for that purpose, has been held to vary the responsibility of the surety, and he adopts it as a sound principle, that delay, unaccompanied with *fraud*, or a settled *agreement* with the principal for that purpose, will not discharge him. If the rule had been that delay, though contrary to the declared wishes of the surety, would exonerate, the books would not have been without precedents, for the case must have been of almost daily occurrence.

I am obliged to conclude, that the plaintiff is not, in this court, entitled to relief. He has not availed himself of the established means in his power, of compelling Baldwin to collect his debt of Fowler; and there is no proof or pretext, that Baldwin, by any agreement with Fowler, enlarged the time of payment, or impaired the rights of the plaintiff, in his relation as surety. The plaintiff might at any time, have paid the debt, which he admits he never offered to do, or he might have compelled, by application to this court, the collection of the debt of Fowler. He has done neither, and has no ground for equitable relief.

I am, accordingly, of opinion, that the bill be dismissed with costs.

Bill dismissed.

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HEMAN KING, APPELLANT, AGAINST DANIEL BALDWIN AND REM ADRIANCE, EXECUTORS, AND ELIZABETH BALDWIN, EXECUTRIX, OF ELISHA BALDWIN, DECEASED, AND CALEB FOWLER, RESPONDENTS.

In the Court of Errors, New York.

MARCH, 1819.

[REPORTED, 17 JOHNSON, 384-404.]

*The Court of Chancery once having had jurisdiction, will retain it, though the original ground of jurisdiction, the inability to recover at law, no longer exists.*

*If there be a doubt whether a defence be available at law, and there is no doubt of a jurisdiction of a court of equity, and the defendant at law omits to make his defence there, or if he sets it up, and it is overruled, on the ground that it cannot be made at law, a court of equity may afford relief, notwithstanding a trial at law.*

*As where a defendant to a suit at law, being surety for his co-defendants, set up, in his defence, that the plaintiff, though urged by the surety to prosecute and collect the money from the principal debtor, had refused to do so, and delayed until the principal became insolvent, which defence was overruled; the surety may, notwithstanding*

*ing, seek relief in the Court of Chancery, on the same ground as that set up by him at law.*

*Where a creditor does an act injurious to the surety, or omits to do an act, when required by his surety, which his duty towards the surety enjoins him to do, and the omission is injurious to the surety, the latter is discharged, and may set up such conduct of the creditor as a defence to a suit against him at law.*

*A surety, when the debt becomes due, may come into a court of equity to compel the creditor to sue for and collect his debt of the principal debtor.*

[The decree of the chancellor, in the case of King v. Baldwin, was subsequently brought on appeal before the Court of Errors and reversed. The state of the record was the same as in the court below; and after argument, the following opinions were given, and decree of reversal made.]

SPENCER, Ch. J. The following facts I consider sufficiently proved and established. That the appellant signed the note as surety with Fowler to Baldwin; that in 1808 and 1810, the appellant applied to Baldwin, representing the approaching insolvency of Fowler, and earnestly urged him to prosecute Fowler and collect the note; that Baldwin peremptorily refused to do so, declaring he would not trouble Fowler, if he never got his money.

That, prior to the month of June, 1812, Fowler was discharged from his debts under the insolvent act, and in the month of June, 1812, the note given by the appellant and Fowler was put in suit.

The evidence renders it reasonably certain, that had Baldwin prosecuted the note when he was required to do so, the money might have been collected of Fowler.

The appellant was alone arrested, and the cause was tried at a Circuit Court, in November, 1812, and a verdict was obtained against the appellant, for the principal and interest of the note, upon which a judgment was entered up, and an execution issued. On the trial, the appellant offered proof of the facts; that he gave the note as surety, and that the plaintiff at law had been required to sue Fowler, which he had refused to do; and that if he had sued him, as required, the note might have been collected of him this proof was overruled, and no motion was subsequently made for a new trial.

Two questions have been argued: 1. Whether the appellant is

not precluded from his rights in equity, in consequence of the proceedings in the Supreme Court, and his acquiescence in the decision at law. 2. Whether the facts of the case, if the appellant is not thus precluded, entitled the appellant to relief in equity.

I do not understand the chancellor to have expressed a decided opinion, that the appellant is concluded from asserting his rights in a court of equity, from the fact of his having been prevented, by a decision at the circuit, from going into his evidence. The only remark upon that point is, "that, perhaps, it would be sufficient to rest the objection to the plaintiff's claim here, on the trial and recovery at law;" he proceeds to show, that the defence was equally cognizable at law and in equity, but there is no express decision on that point.

I consider it an established principle, that where a court of equity once had jurisdiction, it will insist on retaining it, though the original ground of jurisdiction, the inability of the party to recover at law, no longer exists. (1 Madd. Ch. 23.) In *Atkinson v. Leonard* (3 Bro. Ch. Rep. 218), Lord Thurlow said, "it did not follow, because a court of law will give relief, that this court loses the concurrent jurisdiction it had always had; and till the law is clear on the subject, the court would not do justice in refusing to entertain the jurisdiction." To the same effect are 9 Ves. 464, and 7 Ves. 19. In *Bellow v. Muhell* (1 Atk. 126), Lord Hardwicke overruled an objection like the one made here: the plaintiff had been sued at law, and upon the trial, insisted to have a sum of money allowed him; and because it was not allowed, he filed his bill in equity, and his lordship entertained the bill, because it was matter of contract and account, and because he considered the party justly entitled to it.

I cannot view the appellant's bill as founded on a matter which is *res adjudicata*. Suppose a matter of set-off be offered on a trial at law, and overruled, and the party acquiesced, would that have been a bar to a suit? Certainly not; for, as the matter was never passed upon by the jury, it never was a subject of trial: it was not the appellant's fault that the evidence was not received, and it would be unjust that he should suffer. If it had been a clear case of a defence at law, the objection would have force; but until the case of *Pain v. Packard*, the principle had not been distinctly settled in the Supreme Court; and, beyond all doubt, if the appellant was entitled to relief, the relief in similar cases, in the English courts, had been usually afforded in equity. I entirely

subscribe to the opinion of Lord Redesdale (*Bateman v. Willoe*, 1 Sch. & Lef. 205), that, on a bill, in the nature of a bill for a new trial, after a trial at law, and where the subject was passed upon and decided on its merits, though the decision was wrong, a court of equity will not give relief. I go further, and hold, that if the matter was strictly of legal jurisdiction, and the nature of the case required the defendant at law to make his defence, as in the case of a direct payment upon a bond or note, in such cases a court of equity will not aid the negligence of the party. But if it be doubtful whether a court of law can take cognizance of the defence, and there exists no doubt of the jurisdiction of a court of equity; and if, in such a case, a defendant at law, under the influence of such doubt, omits to make his defence, or if he bring it forward, and it be overruled, under the idea that it is not a defence at law, it is not granting a new trial for a court of equity to afford relief, notwithstanding the trial at law. In the case of *Bateman v. Willoe*, Lord Redesdale said: "There may be cases cognizable at law, and also at equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law." But the case of *Rathbone & Rathbone v. Warren* (10 Johns. Rep. 587), is expressly in point.

The Supreme Court have, undoubtedly, decided the principal question in this cause, in the case of *Pain v. Packard* (13 Johns. Rep. 174), that if the payee of a note is required by the surety to proceed without delay, to collect the money of the principal, who is then solvent; and if the payee neglects to proceed against the principal until he becomes insolvent, the surety may plead these facts at law; and if they are established, he will be exonerated. The chancellor, aware of this decision, has dissented from it, with a liberality and respect calculated to induce a re-examination of the doctrine with the same liberal feelings. It is true, that the case of *Pain v. Packard* was decided without argument at the bar; but it is equally true, that it received a very critical and deliberate examination by the court.

It will be observed, that in the cases of the *People v. Jansen*, and *Pain v. Packard*, the Supreme Court referred to the case of *Tallmadge v. Brush*, and admitted the authority of that case, that mere delay by the creditor, in suing the principal, would not discharge the surety; and the principle adopted in *Pain v.*

Packard was this, that where the creditor did an act injurious to the surety, or omitted to do an act when required, which equity and his duty to the surety enjoined it upon him to do, and which omission was injurious to the surety, in either of these cases, the surety would be discharged.

The chancellor expressly recognized the principle in equity, and which is supported by a strong current of authorities, that the surety has a right to apply to a court of equity, at any time after the debt is due, to coerce the creditor to bring his action to collect the debt of the principal. Without referring to any authority, the case of *Rathbone & Rathbone v. Warren*, decided in this court, with entire unanimity, establishes the principle, that if the creditor does any act impairing the rights of a surety, or varies the terms of the obligation, or enlarges the time of performance, without consulting the surety, the latter will be discharged.

The only point on which the chancellor and the Supreme Court differ is this: the chancellor maintains, that the surety has no right, by an act *in pais*, to require the creditor to coerce the principal by suit to pay the debt, but that he must apply to a court of equity, which will lend its aid for that purpose; whilst in the case decided in the Supreme Court, it is held, that the creditor is bound to prosecute the principal at the request of the surety, and if he fail to do so, and the principal become insolvent afterwards, so that the debt is lost, as against him, the surety will be discharged.

The chancellor considers it unnecessary and inexpedient to introduce what he considers a new principle of action between the creditor and surety; he apprehends that it will open a litigious inquiry as to the uncertainty and efficiency of the notice, and that such a weapon, put into the hands of a surety, affords a temptation to vexation and fraud.

The principle adopted by this court, in *Rathbone v. Warren*, that a surety will be discharged, if a new agreement be entered into between the creditor and the principal debtor, varying or enlarging the time of the performance of a contract, although amply supported by cases decided in the English courts, is of modern growth, even in a court of equity. And it is well settled now, that this defence may be set up at law. Gibbs, Ch. J., says, in *Orme v. Young*, that the principle is borrowed from a court of equity. Our system of jurisprudence is in a constant progress of improvement, and some of the most valuable principles have



sprung up and attained their perfection within the recollection of many members of the bar. Many cases might be mentioned, but I will only refer to that just and salutary rule, that a court of law will take notice of, and protect the rights of an assignee of a chose in action. I have witnessed the rise, progress, and establishment of that wholesome and equitable principle. This, too, was borrowed from a court of equity. The soil into which it has been transplanted, is congenial to its nature and its perfection; it has saved much litigation and enormous costs.

I do not, then, perceive any solid objection to a court of law taking cognizance of the matters forming the grounds of the appellant's relief, because in such cases, courts of equity have also jurisdiction. Much less do I perceive the necessity of applying to a court of equity to compel a creditor to do what equity and good conscience requires of him. Courts of equity, when they interpose to compel a creditor, at the instance of a surety, to sue the principal debtor, undoubtedly proceed on the sound and just principle, that it is the duty of the creditor to obtain payment, in the first instance, of the principal debtor, and not of the man who is a mere surety that the principal shall pay the debt. The doctrine is, that it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazards arising from a prolongation of the credit, and that the surety has an equity sufficient to invoke the interposition of the powers of a court of chancery for his protection. In every such case, a court of equity proceeds on a pre-existing equitable obligation, binding on the conscience of the creditor, to exert himself to obtain payment of the debt from the principal, who is regarded as the real debtor, and who ought to be coerced to pay the debt; and it must be the natural and necessary consequence, that if the creditor, after an order or decree, that he shall proceed at law to collect the debt of the principal, omits to do so, and thereafter the principal becomes insolvent, that the surety will be discharged.

If this duty exists, and does bind the conscience of the creditor, I cannot conceive why it may not be brought into exercise, by an act *in pais*, and without the interposition of a court of equity. Upon an application to that court by the surety, if the facts were conceded, an order or decree, that the creditor should prosecute the principal debtor, would be a matter of course; the decree would operate as a mere declaration of the duty, of the creditor, and unless his conscience was dead to a sense of moral duty, it

would not stand in need of such an admonition. If we are at liberty, as I think we are, to regard the consequences of the contrary doctrine, that the surety must either pay the debt himself, or resort to a court of equity to coerce the creditor to proceed at law against the principal, we shall find abundant cause to adopt the principle of the decision in *Pain v. Packard*. The delay and expense are serious evils; the debt itself may, and undoubtedly will, in many cases, be jeopardized and lost, as regards the principal, and the surety will be exposed to final payment, with a vast accumulation of costs.

The principal objection to the decision in *Pain v. Packard*, is, "that it will open a litigious inquiry as to the certainty and efficiency of the notice." This objection lies with equal force to all acts *in pais*; such as a demand of the goods in an action of *trover*, a demand of the maker of a note, and notice of the non-payment to the endorser, due demand and notice of the non-payment to the guarantee; so in a great variety of other cases, the responsibilities of parties depend on acts *in pais*; and I cannot perceive any ground for alarm or apprehension, as to the mode of proof, unless we are prepared to distrust parol evidence in all cases.

The chancellor refers to the civil law, in support of his opinion. It appears that Justinian altered the civil law, and gave to the surety an exception of *discussion*, by which he might require the creditor to proceed, in the first instance, against the principal; but if the creditor does not proceed against the sureties before he has proceeded against the principal, he cannot be obliged to proceed against the principal, until he thinks proper; and his forbearing to proceed against him, does not eventually destroy his right of proceeding against the surety, however great the delay has been. (1 Pothier on Obligations, by Evans, p. 262 266, 267.) The civil law is evidently defective in not affording any process which should coerce the creditor to proceed against the principal, and the superiority of the English law is striking and manifest, in this respect.

My opinion rests on these principles, that the creditor is under an equitable obligation, and such is the essence of the contract to obtain payment from the principal debtor, and not from the surety, unless the principal is unable to pay the debt; that if the creditor unjustly and improperly collude with the principal, to throw the debt on the surety, or after a full and explicit request

by the surety, to proceed at law to recover the debt of the principal, the creditor, from any improper motives, refuses and neglects to do so, and by such refusal and neglect, the means of recovering the debt of the principal are lost, that then the surety is exonerated. This has been treated as a novel and alarming doctrine; but, in my apprehension, it cannot alarm an honest or conscientious creditor; for where is the man who will boldly avow the unjust and immoral principle, that after his debt has become due, and after he has been solicited by the surety to proceed and collect it, by prosecuting both principal and surety, he will abstain from suing, with a view of favoring the principal, and throwing the eventual loss on an innocent man, who, from motives of friendship or humanity, has become a surety?

There is but a minute shade of difference between the opinion expressed by the chancellor, and that of the Supreme Court, in *Pain v. Packard*; and it is simply this: the chancellor holds, that a court of equity must first be appealed to, to compel the creditor to sue at law, whereas the Supreme Court maintain, that he can be required by the surety to sue, without the aid of a court of equity; and if I am right in supposing, that there does exist a moral and equitable duty on the part of the creditor, to collect his debt from the principal in the first instance (and this must be so, or a court of equity could not interpose at all), then I maintain, that a court of law may, without overleaping its just jurisdiction, and in analogy to several other cases in which they take notice of existing equities, not only take cognizance of the equity which requires a creditor to collect his debt from the real debtor, but they may apply the consequence of the refusal of the creditor to sue the principal, without which the principle itself would be of no value, by holding that the surety is discharged, if the creditor will not do his duty and collect his debt, if he can, from the principal.

In the the case of the *People v. Jansen* (7 *Johus. Rep.* 336), we recognized the authority of the case of *Rex v. Barrington* (2 *Vesey*, Jun., 542), that whether a surety has been discharged or not, is a legal question. It is true, Lord Loughborough said, in that case, that it was the form of the security that forced these cases into equity, for that, where the principal and security are bound jointly and severally, the security cannot aver, by pleading, that he is bound as surety; but if he could establish that at law, the rule or principle, by which his liability is to be determined, is

a legal principle. Now, we could not assent to his lordship's proposition, that the fact of a man's being bound as a security, could not be averred at law, if it became material to a legal inquiry; for we understood the rules of evidence to be the same in both courts, and we in vain sought for the principle which allowed the inquiry in a court of equity, and denied it to a court of law; and we, therefore, came to the conclusion, that the defence being a legal one, it necessarily followed, from the general rule of evidence being alike in both courts, that a court of law was competent to administer relief, and to examine all the facts necessary to the relief.

It has been urged, that the surety has nothing to do but to pay the debt, and prosecute the principal himself. Those who make this remark, seem to forget that whatever may be the form of the instrument by which the principal and surety become bound, it was never the intention of the parties that the surety should, in the first instance, pay the debt; he is actually a guarantee, that the principal shall pay the debt; and it would be a very inconvenient and rigid rule, which should require the surety to pay the debt, before he had any remedy against the principal, by means of the security which the creditor holds; and they seem to overlook, also, the clear and settled principle of equity, that the creditor may be coerced, at the instance of the surety, to prosecute the principal.

I disclaim the introduction of a new principle of law, but have endeavored to show that the principle is one already fixed: that a court of law has cognizance of it, and that without the previous monition of a court of equity, if a creditor will disregard the rights of a surety so far, as unconscientiously to refuse to proceed at law for the recovery of his money, when fully and reasonably required, and a loss happens by such refusal, that loss ought to be thrown on the party whose unconscientious conduct has drawn it on himself. I am, therefore, of opinion, that the decree of the chancellor ought to be reversed.

VAN NESS, J., said, that although he concurred in the law as laid down by the chief justice, yet he did not think that the facts in the case warranted the application of it. He was, therefore, of opinion, the decree of the chancellor ought to be affirmed.

PLATT J. The only question, on the merits of the case is,

whether a request by the surety, and a refusal by the creditor, to sue the principal debtor, then living solvent, with the fact of the subsequent insolvency of the principal, does in equity exonerate the surety from his engagement.

Upon a careful examination of all the authorities on this point, my mind has been irresistibly led to the conclusion, that according to the rules of law and of equity, which are alike in this case, the facts here disclosed do not form a defence in the suit of the creditor against the surety.

By the law of such contracts, the surety, as the original co-obligor or promisor, stands in the same relation to the creditor as the principal debtor, so long as the contract remains unaltered by the act of the creditor, with the acknowledged right in the surety, at any time after the money becomes due, to pay the debt, and to sue his principal, at his own risk, for indemnification. The surety may, also, by resorting to chancery, in most cases, compel the creditor to sue the principal debtor. I say, in *most cases*; for, in answer to a bill for that purpose, the creditor may show a state of facts which would destroy the equity of such an application. It is not, *of course*, to compel such suit against the principal; and hence, the reason, I apprehend, for requiring the surety to resort to a court of equity for that relief. For instance, suppose the creditor should answer, and prove, that the principal debtor is utterly insolvent, or resides under a foreign jurisdiction, or that the surety had been amply indemnified by his principal, or by a separate contract had assumed to pay the debt for his principal, a court of equity would, in these cases, deny such relief.

The thorough review of all the cases on this head, by his honor the chancellor, in assigning the reasons for his decree (2 Johns. Ch. Rep. 554), renders it useless for me to refer to or comment on them.

I concurred in the judgment of the Supreme Court, in the case of *Pain v. Packard* (13 Johns. Rep. 174); but, upon more full and deliberate investigation, I am convinced, *that* judgment was erroneous; and I rejoice that I can now so early enjoy the privilege of acknowledging my error. However fit and proper it might be for the *Legislature* to modify the rules of law and equity, in order to afford a more cheap and convenient relief and protection to sureties in such cases (though I doubt very much the expediency of such a law), I am convinced that, according to the

*existing law*, the appellant, as surety, is not entitled, upon the evidence before us, to any protection against the claim of the respondents. Although we are now pronouncing an irreversible judgment in this court of dernier resort, we ought not to be unmindful of the momentous truth that it is our office here to *expound* and not to *make* the law.

My opinion is, that the decree of his honor the chancellor ought to be *affirmed*.

YATES, J., was of the same opinion.

ADAMS, ALLEN, AUSTIN, BARNUM, BARSTOW, BATES, CHILDS, DAYTON, MALLORY, NOYES, ROSENCRANTS, and WILSON, senators, concurred in the opinion of the chief justice, that the decree of the chancellor ought to be reversed.

VAN VECHTEN, senator. The case presents two questions for the decision of this court: 1. Whether the appellant is concluded by the recovery against him at law; and, 2. Whether, upon the merits disclosed by the pleadings and proofs in the cause, he is entitled to the relief which the Court of Chancery has denied him.

The first question turns upon the point, whether the matters alleged in the bill and proved, were available to the appellant, by way of defence to the suit at law; for if they were, and he has neglected to avail himself of them, or if his defence was overruled at the trial, and he has acquiesced in the decision of the judge at the circuit, he cannot be permitted to resort to a court of equity, either to repair such neglect, or review that decision. This general proposition is so well settled, that it cannot be disturbed, without overleaping the jurisdictional line, which has been long established between the courts of law and equity, and opening a door to protracted and vexatious litigation. The doctrine, that the decision of a court of competent authority is binding upon all courts of concurrent power, is indisputable. It pervades every regular system of jurisprudence (2 Kames's Eq. 367), and has become a rule of universal law; it is founded on the wisest policy; it springs from the necessity of putting an end to legal controversies, which have been heard and decided. Let me test this case by the foregoing doctrines.

The same matters which are set forth in the appellant's bill, and proved, were stated in the notice to his plea to the suit at law; but the judge at the circuit rejected the testimony which was

offered to verify the facts. From his decision, it was competent for the appellant to appeal to the Supreme Court, and thence to this court, in order to a final review and determination. But he has seen fit to waive that course, and to seek relief in the Court of Chancery, upon precisely the same matters which the judge at the circuit had overruled. Here, then, the question is fairly presented, whether the Court of Chancery could rightfully sustain the complainant's bill. It will readily be perceived, that in order to sustain it, one or two positions must be assumed: Either that the appellant had no relief at law, or that the Court of Chancery had concurrent power with the court of law. I will, therefore, consider, 1. Whether the matters of defence set up by his notice were cognizable at law; and if they were, 2. Whether, admitting the concurrent power of the Court of Chancery, that power extended to reviewing the decision of the court of law?

In the case of the *People v. Jansen* (4 Johns. Rep. 337), the late chief justice said, "that there was nothing in the nature of the defence of a surety to make it peculiarly a subject of equity jurisdiction; and that, whatever would exonerate the surety in one court, ought also in the other. The facts being ascertained, the rule of law must be the same in this court as in the Court of Chancery. In *Rees v. Barrington*, Lord Loughborough asserted the same doctrine. (2 Vesey, Jun., 542.) The rule established in both cases clearly is, that if the form of the security will admit the inquiry at law, whether surety or not, a court of law will take cognizance of the surety's defence. In order to test the applicability of this doctrine to the present case, it is necessary to examine, whether the nature of the security given by the appellant precluded the inquiry at law, whether surety or not. The case above cited arose on bonds, and the solemnity of such instruments forecloses, in general, all inquiry at law into the consideration of them. But the case before the court arises on a joint promissory note, in which a greater latitude of defence is allowable at law; and therefore the consideration may be inquired into and impeached. A payment or a higher security taken, or a release, may be given in evidence, to defeat a recovery. (4 Johns. Rep. 296; 7 Johns. Rep. 26; 4 Term Rep. 36, 37; 3 East. 258; Doug. 106.) Hence, it is difficult to assign a good reason why the appellant's defence at law was not admitted, provided the matter of it was competent to exonerate him. On this point there is an express decision of the Supreme Court, that the defence was admissible at law.

In *Pain v. Packard* (13 Johns. Rep. 174), impleaded with Munson, the action was commenced on a joint promissory note. The defendant, Packard, pleaded that he signed the note as surety, and that he had urged the plaintiff to put it in suit, which he neglected, until the principal became insolvent; and the court said, "there can be no substantial objection to such a plea." It, therefore, is beyond dispute that if the appellant had brought the decision of the judge at the circuit, before the Supreme Court, for re-examination, he would have obtained the full benefit of the defence set up by his notice in the suit at law.

Let me now examine, whether it was competent for the Court of Chancery to interfere, after the merits of this defence had been overruled at law, and when the decision at law was acquiesced in by him.

It will not be pretended, that the Court of Chancery possesses power to review the decisions of the Supreme Court; for that power is vested exclusively in this court. But I admit, that the Court of Chancery can and will, sometimes, relieve against a recovery at law, upon principles of equity. Such relief, however, according to the rule laid down by Lord Ch. Talbot, must be confined "to new matter, proved to have been discovered since the trial; otherwise," said his lordship, "it might be made use of as a method for a vexatious person to be oppressive, and for the cause never to be at rest." Lord Hardwicke, in recognizing the same rule observed, "that a notice of the matter to the council or agent of the party, is notice to the party, and sufficient to repel the new suit, for otherwise there would be no end of suits." In *Bateman v. Willoc* (1 Sch. & Lefroy, 204), Lord Redesdale said, "it is not sufficient to show, that injustice has been done, but that it has been done under circumstances which authorize the court to interfere; because, if a matter has already been investigated in a court of justice, according to the ordinary rules of investigation, a court of equity cannot take upon itself to enter into it again." In *Le Guen v. Gouverneur & Kenble* (1 Johns. Cas. 492, 502), this court sanctioned the doctrine, that every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order; and that if a defendant, having the means of defence in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded.

On the first question, then, I apprehend, the law is settled, that



the matters stated in the appellant's bill and proved, on which he sought relief in the Court of Chancery, were available to him by way of defence to the suit at law, and that his acquiescence in the decision of the judge at the circuit is conclusive against him. The general rule on which I found this opinion, is intended to put an end to litigation, and to cherish peace, that men may know when they may repose with security on the decisions of courts of justice.

I might here stop, inasmuch as the opinion which I have expressed results in favor of the decree of the chancellor. But the second question having also been discussed before this court, and there appearing to be a difference of opinion between the Supreme Court and the Court of Chancery, it may be proper that I should proceed to consider it.

The appellant contends, that he was discharged from his suretyship, by reason of Baldwin's neglect and refusal to sue Fowler, when required by the appellant to do so; and this presents the point on which the Court of Chancery and the Supreme Court differ.

In *Wright v. Simpson* (5 Ves. 734), Lord Eldon said, that he never understood, that, as between the obligee and the surety, there was an obligation upon the former of active diligence against the principal. The surety is a guarantee, and, therefore, it is his business to see that the principal pays. In the *Trent Navigation Company v. Harley*, and in *Peel v. Tattlock* (10 East, 34; 1 Bos. & Pul. 419), the same doctrine is recognized. In *Burn v. Administrators of Pough* (4 Dessaus. Rep. 604), the Court of Appeals of South Carolina said, "a surety will be released where an obligee *does an act* which varies the terms of the *original contract*; but a mere forbearance to sue is not such an act." In *Dehuff v. Turbott's Executors* (3 Yeates' Rep. 160), the Supreme Court of Pennsylvania sanctions the doctrine, that a surety joining in a bond makes the debt his own, and has no power to give directions when the bond shall be put in suit. In *Hunt v. United States* (1 Gallis. 35), Judge Story said, it was a sound principle, that mere delay, unaccompanied with fraud, or a settled agreement with the principal for that purpose, does not discharge the responsibility of the surety. In *Ludlow v. Simond* (2 Caines' Cas. in Error, 30), Mr. Justice Spencer said, both courts of law and equity will cast the responsibility on the surety, if by the terms of his engagement he has assumed it; but neither of them will do this,

when he is not brought within the precise scope of his undertaking. Kent, Ch. J., said, a surety calculates upon the exact extent of his engagement, and it is not to be supposed to bestow attention to the transaction, and is only to be prepared to meet the contingency of his responsibility, when it shall arise by the contract. It, therefore, appears to be the established doctrine, that a creditor can hold a surety to the full extent of his contract; but when the creditor makes a new agreement with the principal, without the surety's consent, the latter is thereby discharged. The irresistible conclusion from this doctrine is, that unless the creditor varies, by a new agreement, the contract, by which the surety has bound himself, the obligation of the surety remains unimpaired; and this accords with the common understanding of mankind on the subject. But the appellant contends, and so the Supreme Court has decided in *Pain v. Packard*, before cited, that the creditor must sue, at any time, upon the surety's request, or the latter will be exonerated. I state the rule thus broadly, because I do not perceive how it is to be qualified; for unless the request of the surety to sue the principal has an imperative effect, in all cases, the rule will be productive of much mischief, and will be rendered uncertain in its application. It has already been shown, that this rule of the Supreme Court is at war with the established doctrine of the courts, both of law and equity, in England, recognized and enforced by the highest judicial tribunals of some of our sister States, approved and sanctioned by an enlightened judge of the Supreme Court of the United States, and supported by the decision of the Court of Chancery of this State. And here I must be permitted to express my regret, that I have not been able to ascertain the reasons and authorities, upon which the decision of the Supreme Court is founded, as it deprives me of the benefit of those reasons and authorities, in forming the opinion which my duties require me to pronounce in this cause. I shall, however, proceed, with great respect, to state the reasons which govern my opinion.

I consider the settled and known doctrines of judicial tribunals as invaluable landmarks, which ought not to be altered without cogent reasons. Such alterations lead to uncertainty, and frequently involve the substitution of experiment in the room of experience, which is generally a source of more or less inconvenience. Besides, it appears to me worthy of grave consideration, whether a departure, by the judicial tribunals of a particular

State, from a well-established general rule of law, will conduce to the advancement of justice. It must not be forgotten, that this is a highly commercial State, and that the commercial dealings between our citizens and those of other States, frequently produce contracts with sureties, to a large amount. In making such contracts, it is presumable that parties mean to repose themselves upon the generally established and known rules of law on the subject. The introduction of a new and local rule, may, therefore, be productive of inconvenience, and perhaps of injustice. In cases which may arise between our own citizens, and the citizens of other States or countries, the local rule may mislead the former, but can afford them no protection. Why, then, should a new principle of action, between creditor and surety, be introduced here? The surety has now ample and well known means of relief in a court of equity, which will at once compel the creditor to do his duty, upon just terms. This is the old, settled course, recognized in *Nesbit v. Smith* (2 Bro. Ch. 570,) and in *Burn v. Administrator of Pough* (4 Dessaus. Rep. 604,) and I may add, in all the cases to be found. For when the books speak of the right of a surety to coerce the creditor to sue, by an application to chancery, it may fairly be inferred that they mean, that he cannot be coerced in any other way. Again, the surety has, at all times, the power of relieving himself, by paying the debt and suing the principal in his own name; and this is within the scope of his undertaking, and according to the common understanding of its true meaning, that he is bound to see the debt paid. He is the person who trusts the principal; for the creditor manifests, by requiring a surety, that he does not rely on the principal; this renders the rule of Lord Hardwicke (3 Atk. 93,) "that he who trusts most shall lose most," strictly applicable to the surety.

Upon the whole, I am clearly of opinion, that the chancellor's decree ought to be affirmed.

BOWNE, DITMIS, HASCAL, LIVINGSTON, LOUSENBERRY, SEYMOUR, SKINNER, VAN BUREN, and H. YATES, Senators, were of the same opinion.

The members of the court being thus equally divided in opinion,\* the president (Licut. Gov. Tayler) declared his opinion, that the decree of the chancellor ought to be reversed; And it was, there-

\* For affirming, 13; for reversing, 13.

upon, "ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be reversed: And it was further *Ordered*, that the injunction already issued by the said Court of Chancery, to restrain the said Elisha Baldwin and the said Caleb Fowler, and also the said sheriff of the county of Putnam, from further proceeding on the judgment obtained in the Supreme Court of this State, by the said Elisha Baldwin against the said Heman King and Caleb Fowler, and particularly mentioned in the pleadings in this cause, be, and the same is hereby made perpetual against the representatives of the said Elisha Baldwin, and against all persons whomsoever: And it is further *Ordered*, that the several sums of money deposited by the appellant in the office of the assistant register of the Court of Chancery, on or about the 30th day of August, 1815, and on the 27th day of October, 1817, or on any other days be paid over, by the assistant register, to the said appellant, or to his solicitor: And it was further *Ordered*, that the said respondents, Daniel Baldwin and Rem Adriaance, and the said Elizabeth Baldwin, the executors of the said Elisha Baldwin, deceased, pay to the said appellant, or to his solicitor, the *costs* incurred by the said Heman King, in defence of the said suit or action at law, before mentioned; and do, also, pay to the said appellant, or to his solicitor, the costs of the said appellant in the Court of Chancery; and that the proceedings be remitted," &c.

Decree of reversal.

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On one of the points presented in *King v. Baldwin*, the decision of Chancellor Kent has remained without question; and it is now admitted, to present the sounder view of the law on the other, even in those States where the decision of the Court of Errors is followed as a precedent. That the duty of performance rests on those who make engagements, not on those with whom they are made, is too plain for argument, and equally true, whether the benefit of the consideration is shared by all the contracting parties, or moves solely to one. Hence the creditor may leave the duty of fulfilling the contract or procuring its fulfilment, where the words of the contract place it, without fear that his inaction will debar him from the subsequent assertion of his rights or discharge the surety from the obligation into which he has entered. *Fulton v. Matthews*, 15 Johns. 433; *The People v. Russell*, 4 Wend. 570; *The Albany Dutch Church v. Vedder*, 14 Id. 165; *Kelly v. Shudebaker*, 15 Indiana, 145; *Williams v. Townsend*, 1 Bosworth, 411; *Lawson v. Snyder*, 1 Mary-

land, 79; *McGehee v. Gewin*, 25 Alabama, 176; *Hunt v. Bridgham*, 2 Pick, 581; *Jordan v. Trumbo*, 6 Gill & Johns. 103; *Joslyn v. Smith*, 13 Vermont, 353; *Sibley v. McAllaster*, 8 New Hampshire, 389; *The Farmers' Bank of Camden v. Reynolds*, 14 Ohio, 84; *The United States v. Kirkpatrick*, 9 Wheaton, 760; *McLemore v. Powel*, 12 Id. 554; *The United States v. Nichol*, Ib. 505; *Doe v. The Postmaster General*, 1 Peters, 318; *Montgomery v. Dillingham*, 3 Smedes & Marshall, 467; *Haynes v. Covington*, 9 Id. 479; *Anderson v. Munnon*, 7 B. Monroe, 217; *Johnson v. Searcy*, 4 Yerger, 102; *Dawson v. The Real Estate Bank*, 5 Pike, 283; *Creath's Ad. v. Sims*, 5 How. 192; *Carter v. Jones*, 5 Iredell's Equity, 196; *Ring v. The State Bank*, 4 English, 185; *Cathcart's Appeal*, 1 Harris, 416, 420; *Carr v. Rowland*, 14 Texas, 275; *Burke v. Cruger*, 8 Id. 66, 11 Id. 694; *Richards v. The Commonwealth*, 4 Wright, 146. If the creditor voluntarily places himself in such a position that he cannot sue the principal, he thereby discharges the surety. But mere delay on the part of the creditor, unaccompanied by any valid contract with the principal, will not discharge the surety. *Price v. Kirkham*, 3 Hurlstone & Colman, 437.

It is well settled, in accordance with these decisions, that however much the forbearance of the creditor towards the principal debtor may prejudice the surety, it will not have the effect of discharging him from liability. *The Pittsburg and Fort Wayne Railway Company v. Schaeffer*, 9 P. F. Smith, 350.

The anomalous decision made by the Supreme Court of New York in *The People v. Jansen*, 7 Johns. 332, must be considered as overruled by these cases, and by that of *Locke v. The United States*, 3 Mason, 446, where it was said by Story, J., that he adhered to the doctrine advanced by him in *The United States v. Hunt*, 1 Gall. 42, that mere delay would not discharge a surety, and was glad to find that it had since received the sanction of Chancellor Kent, in the case of *King v. Baldwin*. It was further held, that there was no difference in the legal effect of the tacit acquiescence in the non-payment of money or other failure in the performance of an obligation, implied in an omission to enforce its fulfilment, and a direct authorization to delay performance or keep the money till called for; and that, as the surety would continue to be bound in the former case, he could not be discharged in the latter. The surety must submit to a loss which has its source in his own failure to pay the debt when due, and then proceed against the principal, and cannot rely on a want of diligence which he has shared, as a reason for being relieved from the performance of his obligation. *Grover v. Hoppock*, 2 Dutcher, 191; *The St. Albans Bank v. Dillon*, 30 Vermont, 122; *Commercial Bank v. French*, 21 Pick, 486; *Alcock v. Hill*, 4 Leigh, 622; *Harrison v. Lane*, 4 Bibb, 466; *Carr v. Howard*,

8 Blackford, 199; *Ring v. The State Bank*, 4 English, 185; *Cathcart's Appeal*, 1 Harris, 419. "That loss from indulgence which is purely permissive, will discharge a surety," said Gibson, C. J., in the case of *The United States v. Simpson*, 2 Penna. R. 437, "is unsupported by authority, and in contradiction of the most obvious principles of justice; such a loss being attributable to the surety's own negligence, in omitting to warn the creditor to proceed; without which he may not know that a loss is impending. Actual detriment is not the criterion, or a material ingredient. If the creditor has disabled himself, the surety is *ipso facto* discharged; if he has not, no eventual loss from mere delay will produce that effect." The material question, therefore, is, did the creditor enter into a binding agreement for forbearance; if he did not, time actually given in pursuance of a promise to that effect, will not discharge the surety.

The distinction between an agreement to give time, and of time given irrespectively of agreement, depends on reasons which though subtle, are, notwithstanding, sound. A naked promise, to forbear enforcing the payment of a debt, has no legal efficacy, and works no change in the antecedent relations of the parties. It may, indeed operate as a motive for indulgence, but has no more legal weight than any other motive sufficiently strong to produce the same effect. But an agreement for time, sustained by a sufficient consideration, varies the contract, by changing the period for its performance, and not only delays the creditor, but deprives the surety of the right, which he would otherwise have, to compel the principal to fulfil the engagement. For although a contract cannot be varied at law without the consent of all the parties, whether bound as principals or sureties, equity regards the matter in a different aspect, and will give effect to any agreement that may be made between the principal and creditor, who are the persons chiefly interested. Hence, a change made by them, discharges the surety, by bringing the original contract to an end, and substituting another in its place, to which he did not assent, and which consequently does not bind him.

This result will not follow, unless the change is material; but time, which is always of the essence of the contract at law, is equally so in equity, when an alteration in the period fixed for performance will affect the rights and duties of the parties. To make a gift of time effectual, it must be binding on the surety and preclude him from enforcing the punctual payment of the debt, which may be necessary to his protection. Hence, the only way to do substantial justice under these circumstances is, to set him free, and leave the creditor to seek a remedy under the contract in the new form into which he has shaped it.

On the other hand, when a promise of forbearance is without consideration, and has no legal force, it may fairly be presumed to be in

subordination to the rights of the surety. He may, therefore, enforce the payment of the debt, through a bill in equity or notice in *pais*, and if so there is no ground for holding him discharged.

It is, accordingly, well established that taking additional or collateral security which though payable at a future day, does not suspend or extinguish any existing right or remedy, will not discharge the surety either at law or in equity. *Morgan v. Martien*, 32 Missouri, 438; *For v. Parker*, 41 Barb. 31; *Eyre v. Everett*, 2 Russell, 381. Such a course tends to the benefit of the surety by increasing the means of payment, and although it may induce delay, does not preclude the right to insist on prompt performance.

The rule is illustrated by the case of *The Adams Bank v. Anthony*, 18 Pick, 238, where the plaintiff was permitted to recover against the surety, notwithstanding a failure to include the note on which the suit was brought, in an attachment issued for another demand against the principal, under which a sufficient amount of property had been seized to satisfy both causes of action. This decision shows, that the creditor may remain quiescent until the surety summons him to proceed, even when the circumstances are such that he might collect the debt by the exercise of ordinary diligence. In like manner, a stipulation in a lease, that the lessor may take the rent in kind out of the products of the land, will not make it his duty to do so, or render a failure to act upon or enforce the stipulation, a discharge of the sureties of the lessee. *Taft v. Gifford*, 13 Metcalf, 187.

It results from the same principle, that a master or employer, is under no obligation to examine the accounts or set a watch on the dealings of his agents or servants, for the benefit of those who have become answerable for their good behavior, or even to give notice of specific instances of embezzlement or misconduct, for the purpose of putting the sureties on their guard and stimulating them to take measures for their own protection, because the latter are bound to inquire for themselves, and cannot complain that they were not informed unless the circumstances are such that silence is equivalent to a *suppressio veri*. (2 Leading Cases in Equity, Part 2, 532, 3 Am. ed.) *McGehee v. Gewin*, 25 Alabama, 176; *Dawson v. Lawes*, 23 English L. & E. 365.

The creditor is bound to good faith, but not to diligence, and his laches will not discharge the surety short of the gross negligence which is tantamount to fraud. *The United States v. Kirkpatrick*, 9 Wheaton, 720; *The State Bank v. Chalwood*, 3 Halstead, 1. The sureties of a cashier or teller may accordingly be answerable for a defalcation which has been connived at by the president and directors. *The Railway Co. v. Schaeffer*, 9 P. F. Smith, 350; *The Amherst Bank v. Root*, 2 Metcalf, 522; *Muir v. The Bank of Alexandria*, 1 Peters, 46; *Taylor v. The*

*Bank of Kentucky*, 2 J. J. Marshall, 565. The wrong is not less in each individual for being shared with others, nor does it cease on that account to be within the condition of the bond.

"The principle," said Sharswood, J., in *The Pittsburgh and Fort Wayne Railway Company v. Schaeffer*, "was reconsidered and reaffirmed in *The United States v. Vanzandt*, 11 Wheat. 184, where it was held that the omission of the proper officer to recall a delinquent paymaster, contrary to the express injunction of an act of Congress, did not discharge the surety. *The Commonwealth v. Brice*, 10 Harris, 211."

"The reasons so clearly stated by Story, J., in regard to officers of government, apply with equal force to the officers of corporations. Corporations can act only by officers and agents. They do not guarantee to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to, and connived at by the officers of the bank, was held to be no defence. *Taylor v. The Bank of Kentucky*, 2 J. J. Marsh, 564."

For a like reason, a man who guarantees the good conduct of an officer or agent, for a definite period, or so long as he shall be employed, cannot put an end to his responsibility by a notice that he will be no longer bound, or requiring the master to dismiss the servant. *Calvert v. Gordon*, 7 B. & C. 809, 3 M. & R. 124; *McGehee v. Gwin*, 25 Alabama, 176. The point having been decided against the defendant in *Calvert v. Gordon*, he applied for an injunction, and it was contended in support of the motion that inasmuch as the other parties might bring the contract to a close by a withdrawal on one side, or a dismissal on the other, the guarantor ought to have the same privilege. It was also said, that the master ought to bear the loss arising from the misconduct of a servant whom he had chosen to



employ, with notice that he had become an object of just suspicion to the surety. The case was, however, decided in equity as it had been at law, on the terms of the contract which bound the defendant absolutely, without empowering him to terminate his liability by notice. *Gordon v. Calvert*, 2 Simons, 253, 2 Russell, 531. It was determined in like manner in *Andrews v. Beale*, 3 Cowen, 698, that the refusal of a sheriff to remove a deputy in compliance with the request of his sureties, did not exonerate them from a default subsequently committed by their principal; and the same point may be found in *McGehee v. Gewin*, 25 Alabama, 176. Although the case of *Gordon v. Calvert*, was questioned in *Goss v. Stevenson*, 2 Sumner, 453, it would seem to be in strict conformity with the doctrine, that chancery will not relieve against a contract in equity except on the ground of fraud, accident, or mistake.

In these instances, the contract was under seal; but a parol guarantee based upon a consideration which is entire, and has been wholly or partly executed, is governed by the same principle. An insurer who has received the premium, cannot return it and rescind the contract, nor can a vendor who warrants the docility and soundness of a horse, escape from the liability which he has incurred, without the consent of the purchaser. When, however, the contract is unilateral, as in the case of a guaranty of future sales or advances, which the creditor is not bound to make, it is revocable and may be withdrawn at any time before it is acted upon by the latter (ante, 96). Addison on Contracts, 667.

As the creditor is not bound to obtain satisfaction from the principal, he may, in general, stay the proceedings, which he has instituted for that purpose, or pursue them in the way which he deems most advisable. *Baker v. Davis*, 2 Foster, 28; *Lawson v. Snyder*, 1 Maryland, 71. In *The Commissioners of Berks v. Ross*, 3 Binney, 250, suit was brought against the sureties in a bond given to secure the faithful performance of a contract for building a bridge. The defendants alleged that the plaintiffs had entered into an arrangement with the principal, by which he was discharged from arrest, on entering a common appearance and executing an assignment of all his property as security, and that he had thus been enabled to leave the State, and escape beyond the reach of legal process. It was, however, held, that as the new contract did not vary the old, or preclude the right to enforce the bond, there was no reason why it should discharge the sureties, who had gained rather than lost by a transaction which made all the property of the principal available for the payment of his debts. The supineness of the creditor will not be a defence, even when it results in the loss of a lien on the real estate of the principal debtor, which would otherwise have been available for the payment of the debt. Thus, in *The United States v. Simpson*, 3 Penna. Rep. 437, the surety was held

liable, although a judgment against the principal had been allowed to expire, and the land which it bound was sold under executions issued by other persons. This decision was followed in *Munsdorff v. Singer*, 5 Watts, 179, and *The Farmers' Bank of Ohio v. Reynolds*, 13 Ohio, 84, and the surety held not to be discharged by a failure to revive a judgment against the principal, resulting in the loss of a lien which was the only security for the payment of the debt.

The principle is the same when a failure to proceed against the maker of a promissory note is relied on as a defence in a suit against the endorser. In general, such persons stand in the relation of principal and guarantor; and any act which impairs or suspends the recourse of the holder of the instrument against the former, will discharge the latter. But in *Lenox v. Prout*, 3 Wheaton, 520, the countermand of an execution against the maker of a note before levy, was held not to defeat a suit against the endorser, who was said to have no right to complain of a delay, which he might have terminated by taking up the instrument and enforcing it by suit. In *Bellows v. Lovell*, 4 Pick. 153; 5 Id. 307; judgment was in like manner given against an accommodation endorser, at the suit of an endorsee who had taken the instrument with notice that the transfer dissolved an attachment which had been laid on the goods of the maker. An instance of the same nature may be found in the *Montpelier Bank v. Dixon*, 4 Vermont, 399, where a surety was held liable, notwithstanding the discontinuance of an attachment against the property of the principal, in pursuance of an arrangement for the payment of the debt; and this decision was followed in *Baker v. Marshall*, 16 Vermont, 325.

But while the creditor may abstain from taking active measures against the principal, and even abandon those which he has commenced, he must not relinquish any lien or impair any remedy that can be made effectual for the collection of the debt. He is not bound to protect the surety, but he is bound to do nothing to prevent the surety from protecting himself. The right of the latter to be subrogated to all the means at the disposal of the creditor, is one of the highest equity; and any act by which it is curtailed, will, to the extent of the injury inflicted, be a defence. A failure to take the goods of the principal in execution will not discharge the surety because the loss arises from the supineness of the creditor, and not from his act. Nor will he be discharged by the laches of the creditor in not obtaining judgment, or in suffering a judgment to expire that has been already entered. But if the lien of a judgment be released, a levy withdrawn, or any other security abandoned, to the injury of the surety, and without his consent, he may claim a credit to the full amount of the benefit surrendered; *Kuhns v. The Westmoreland Bank*, 2 Watts, 136. The law was so held in *The Commonwealth v. Miller*, 8 S. & R. 452, and the withdrawal of a levy

on the goods of the principal, in consequence of which they were seized and sold under a writ issued in another suit, said to entitle the sureties to reduce the demand against them, by deducting all that would have been made had the execution been pushed to a sale. A similar decision was made in *The Commonwealth v. Haas*, 16 S. & R. 252, although both cases were said, by Rogers, J., to depend on the general rule, that a levy on the goods of one of several joint debtors satisfies the debt as it regards all, whether they are principals or sureties. *Hunt v. Breeding*, 12 S. & R. 41; *Lyon v. Hampton*, 8 Harris, 46; *Holt v. Bodey*, 6 Harris, 207. But in *Diron v. Ewing*, 3 Hammond, 280, where the exoneration of the surety was again held to follow from the withdrawal of an execution against the goods of the principal, the decision was based on the peculiar relation in which they stood to each other, and not on the more general ground taken in *The Commonwealth v. Haas*. And the better opinion would seem to be, that a levy will not operate as satisfaction when the creditor is not actually paid, unless a loss is inflicted on the debtor by placing the goods beyond his reach, or there is some other circumstance making it inequitable to enforce the debt. *Cathcart's Appeal* 1 Harris, 419.

Whatever doubt may exist as to the reason, there is none as to the result; and all the authorities agree, that the abandonment of an execution which has once been actually laid on the goods of the principal, will discharge the surety. *Carpenter v. Devon*, 6 Ala. 718; *The State Bank v. Edwards*, 20 Id. 616; *Sneed v. White*, 3 J. J. Marsh, 525; *Givens v. Briscoe*, Ib. 534; *Jones v. Bullock*, 3 Bibb, 467; *The Farmers' Bank of Ohio v. Reynolds*, 13 Ohio, 84; *Baker v. Fordyce*, 9 Barr, 275; *Talmage v. Burlingame*, Ib. 21; *Ferguson v. Turner*, 7 Missouri, 497; *Curran v. Colbert*, 3 Georgia, 239; *Brown v. Riggins*, 12 Id. 271; *Robeson v. Roberts*, 20 Indiana, 155. It is, however, generally conceded that this rule does not apply until actual levy, and that the surety will not be exonerated by the withdrawal of the writ after it has gone forth, but before the goods have been taken under it by the sheriff. *Cathcart's Appeal*, 1 Harris, 416; *Morrison v. Hartman*, 2 Id. 55; *Lennox v. Prout*, 3 Wheaton, 520; *Sawyer v. Bradford*, 6 Alabama, 572; *McKenny's Ex'rs v. Waller*, 1 Leigh, 434. In *Chichester v. Mason*, 7 Leigh, 244, the case last cited was overruled, and the waiver of the inchoate lien, acquired by placing the writ in the hands of the sheriff, held to have the same effect on the obligation of the surety as if the goods had been actually seized and then relinquished. But in *Humphreys v. Hilt*, 6 Grattan, 509, the court held, in accordance with the general course of decision, that a surety would not be exonerated by the withdrawal of an execution, before it had passed into an actual levy. Moreover, as the exoneration of the surety arises from the loss of a means for the collection of the debt, it will not follow

from the abandonment of a levy on land which is bound by the lien of the judgment, nor in any case where it is clearly apparent that the course pursued by the creditor was not injurious. *Baker v. Davis*, 2 Foster, 27; *Sasser v. Young*, 6 Gill & Johnson, 243.

The English decisions are to same effect. Thus in *Mayhew v. Crickett*, 2 Swanston, 193, the withdrawal of an execution, which had been laid on the goods of the principal, under a judgment confessed by him, was held to discharge the surety; and the chancellor would seem to have thought, that the levy was a satisfaction, and might have been pleaded as such at law. Similar ground was taken in *Hurberton v. Bennett*, 1 Beatty's Irish Ch. 386, and the surrender of a leasehold estate, by a tenant, with the assent of the landlord said to exonerate the defendant from the burden of a mortgage, which he had executed as a security for the performance of the covenants in the lease. The term was said to be a security to which the tenant might have resorted for indemnity, and which could not be taken away without freeing him from liability.

The rule applies with as much force where the security waived or surrendered by the creditor was given by the principal, as where it is the result of legal process. For while the one grows out of an effort which the surety had no right to exact, and which was not intended for his benefit, the other is created expressly with a view to the payment of the debt, and cannot be applied to any other way without a breach of trust. Indeed, nothing can be more obvious, than the interest of the surety in the preservation of all the securities held for the debt, or the injury which may be inflicted upon him by their loss or destruction. Hence, the reasons which forbid the creditor to withdraw a lien acquired by execution, preclude him from surrendering property or securities which have been pledged by the principal, and would if properly used secure the debt.

The question arose, in *Baker v. Briggs*, 8 Pick, 122, where the surrender of a horse and gig to the principal, which had been received from him as a security for the debt, subsequently to the period at which it was contracted, was held to exonerate the surety; and it was said that this result would follow wherever the creditor relinquished assets or effects of any description, which might have been applied in payment. "It is a well settled principle of equity," said Parker, C J., by whom the opinion of the court was delivered, "that a creditor who has the personal contract of his debtor with a surety, and has also, or takes afterwards, property from the principal, as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety, as well as himself; and if he parts with it, without the knowledge or against the will of the surety, he shall lose his claim against the surety, to the amount of the property so sur-

rendered." Similar decisions were made in *Perrin v. The Fireman's Ins. Co. of Mobile*, 22 Alabama, 575, and in *Hidden v. Bishop*, 5 Rhode Island, 29; while in *The New Hampshire Savings Bank v. Colcord*, 15 New Hampshire, 110, it was held that the creditor could not rebut the equity arising from the surrender of securities given when the contract was made, by proof that they were exchanged for others of greater value, and that the transaction was beneficial rather than injurious to the surety. This decision, may, however, well be doubted, because when the contract is not varied or extinguished, the relief should not go beyond the loss.

In *Baker v. Briggs*, 8 Pick. 122, the court said that the discharge of the surety by the loss or surrender of the property or securities held for the debt, was derived by chancery from the civil law (ante); but that it was a principle of natural justice which the common law should recognize and enforce, and such is now the current of authority in the United States; *Harris v. Brooks*, 21 Pick. 195; *Carpenter v. King*, 9 Metcalf, 511 (post, 431).

The principle on which these cases rest applies in every instance, where the creditor suffers the means of payment or satisfaction to pass from his hands, without applying them to the discharge of the debt, and consequent indemnification of the surety. *Perrine v. The Fireman's Ins. Co. of Mobile*, 22 Alabama, 575. Thus in *Law v. The East India Company*, 4 Vesey, 824, the surety was held to be exonerated by the payment of a sum of money to the principal, which might have been retained by the creditor, and appropriated to the extinguishment of the demand, although the payment was in good faith under a mistaken impression as to the state of the account. A similar decision was made in *Lichtenthaler v. Thompson*, 13 S. & R. 156, and the receipt of a year's rent from the sheriff, by whom the goods of the tenant had been sold under an execution, held to preclude a subsequent recovery against the surety in the lease, although the money was paid over to a prior owner of the premises, to whom the tenant was also indebted, in the belief that he had the better right. In *Ramsey v. The Westmoreland Bank*, 2 Penna. 203, the surety was in like manner held to be exonerated by the failure of the creditor to collect the debt from the sheriff, by whom it had been made under an execution issued by the holder of a younger judgment against the land of the principal. The justice of this decision is however questionable, unless the creditor knew that the money had been received, and might be had by asking for it.

In *Hayes v. Ward*, 4 Johnson's Ch. 123, the wrong of the creditor in vitiating a mortgage taken for the debt by usury was for a like reason said to entitle the surety to a credit for the amount that could have been recovered on the mortgage if it had been good. "There would,"

said Chancellor Kent, "be much equity in the plaintiff's case, if it should finally appear that the defendant W. had, by his own act, rendered the adequate security which he took from the principal debtor, illegal and void. The very taking of that security by him may have excited confidence in the surety and lulled him to sleep, and deprived him of taking other and sound security, for his own eventual responsibility, until it was too late, and the rights of third persons had intervened. This consideration renders it an act of benevolence and equity, and imposes it as an obligation upon the creditor, who takes security from the principal debtor, to take it fairly and lawfully, and to hold it impartially and justly. According to the doctrine of the civil law, the surety may, *per exceptionem cedendarum actionum*, bar the creditor of so much of his demand as the surety might have received, by an assignment of his lien and right of action against the principal debtor, provided the creditor had, by his own unnecessary or improper act, deprived the surety of that resource. The surety, by his very character and vocation of surety, has an interest that the mortgage taken from the principal debtor, should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor is taken and held in trust, as well for the secondary interest of the surety as for the more direct and immediate benefit of the creditor; and the latter must do no wilful act, either to poison it in the first instance, or to destroy or cancel it afterwards. These are general principles, founded in equity, and are contained in the doctrines laid down in Pothier's *Treatise on Obligations* (Nos. 496, 519, 520), to which reference has been made in the former decisions of this court. *Cheesebrough v. Millard*, 1 Johns. Ch. Rep. 414; *Stevens v. Cooper*, Ib. 430, 431. This doctrine does not belong merely to the civil system; it is equally a settled principle in the *English Chancery*, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and to have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution from another. 2 Ves. 622; 1 Wightwick, 2-6; 1 Dessausure, 409; 2 Madd. Ch. 437; 14 Ves. 162; 10 Id. 412; 11 Id. 22." This decision was cited and followed in *Smith v. Jay*, 23 Vermont, 656, and the release of a mortgage, held to exonerate the defendant from liability, as a surety on the bond which accompanied it.

A similar view was taken in *Collingwood v. Irvine*, 3 Watts, 306, and the creditor said to be answerable for the injury arising from the failure to revive a judgment which had been assigned as security for the debt.

In *Watts v. Shuttleworth*, 5 Hurlstone & Norman, 235, the principal had agreed with the plaintiff to make and put up certain fittings for a warehouse to be paid for by instalments during the progress of the work. The contract contained a stipulation that the plaintiff "shall and may insure the fittings from fire at such time and for such amounts as the architect may consider necessary." The plaintiff did not insure the fittings, and they were destroyed by fire, while still unfinished, during the progress of the work. This failure on his part was held to discharge the defendant from a guarantee which he had given for the fulfilment of the contract. The rule was said to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which it is his duty to do, and the omission proves injurious to the surety, the latter will be discharged.

The surety may also be exonerated by a payment which ought to have been withheld, or by an acceleration of the time of payment to his prejudice. In *The Steam Navigation Company v. Rolt*, 6 C. B., N. S. 550, the defendant guaranteed the fulfilment of a contract to build a ship for a sum which was to be paid in instalments as the work went on. The plaintiffs chose to pay the greater portion of the last two instalments before the ship was finished, and the surety was held to be released from liability for the non-completion of the work to the extent of the anticipated payment. So in *Calvert v. The London Dock Company*, 2 Keen, 638, the payment in advance of money which by the terms of the contract was to be retained until the completion of the job was held to discharge the sureties. The principle is the same when the amount due for building a house is paid to the contractor, after notice that liens have been filed by the material men. *Taylor v. Crooker*, 24 Missouri, 244.

Some stress was laid, in *Hayes v. Ward*, on the argument that the surety might have relied on the mortgage, in consenting to be bound for the payment of the debt, and might justly complain if his expectations were falsified by the wrongful act of the mortgagee; and a similar reason was given in *Watson v. Alcock*, 19 English Law and Equity, 64, 239, for holding that the surety was discharged by the failure of the principal to file a warrant of attorney, which had been given by the creditor as a security for the debt. And although this cannot be said, unless the debt and security are contemporaneous, still a surety may be induced to prolong his liability, and omit measures for his own protection, by knowing that security has been given since the debt was contracted. It would, however, be a mistake to suppose, that the knowledge of the surety, and the influence which it may have upon his conduct, are essential, or even material ingredients in the responsibility of the creditor, which is really founded, as the language of Kent, in *Hayes v. Ward*, indicates, on the relation between the parties, and the

duty of every man to use reasonable care where others are interested, and, above all, to do no act by which they will be prejudiced. *Luke v. Burton*, 39, English Law and Equity, 443; *Hedden v. Bishop*, 5 Rhode Island, 29, 31.

For a like reason it will make no difference that the creditor did not obtain the lien or security which he surrenders until after the surety became responsible, it being his duty to keep all the means of satisfaction intact, without regard to the period at which they were acquired. *Baker v. Briggs*, 8 Pick. 122, 129. *Stewart v. Davis*, 18 Indiana, 74.

The liability of a co-surety for contribution is as well established as the right to demand reimbursement from the principal, and hence the release of one of several sureties or the withdrawal of a levy on his goods will discharge the others *pro tanto*; *Rice v. Morton*, 19 Missouri, 261.

In this, however, as in other cases, the relief will be proportioned to the injury, and will not extend beyond the share or proportion of the burden, which would have fallen on him if it had been equitably distributed among all the parties liable for the debt. *Schock v. Miller*, 10 Barr, 401; *Klingensmith v. Klingensmith*, 7 Casey, 460. For a like reason the surrender by one of several sureties of a mortgage given as an indemnity by the principal, will preclude him from recovering contribution from the rest. *Goodloe v. Clay*, 6 B. Monroe, 233; *Morris v. Taylor*, 26 Alabama, 728. In *Wright v. Stockton*, 5 Leigh, 153, the bar was held to be absolute; but the question arose from the failure of the creditor to comply with a notice to proceed against the principal, which had been addressed to him under the statute law of Virginia, and was, therefore, influenced by considerations, which would not apply under ordinary circumstances.

The principle is independent of the relation of suretyship, and applies whenever a remedy to which a debtor would have been entitled on satisfying the demand of the creditor is taken from him or rendered ineffectual by the latter. Any act by which a debtor is deprived of a means of indemnity or payment will discharge the debt wholly or *pro tanto*. The right of subrogation is one of the highest equity, and a loss arising from the violation of it will be thrown on the party to whose wrong or default it is due. If there are two funds or persons, one primarily, the other secondarily liable, a release of the first will, to the extent of the resulting injury, preclude the right of recourse against the second. 2 Leading Cases in Equity, part 1, 271, 3 Am. ed. The case of land bound by the lien of a mortgage or other encumbrance, and sold in parcels to successive purchasers, affords a familiar example of a doctrine which applies under a great variety of circumstances. An equity arises in favor of the first purchaser to be indemnified at the expense of the second, which the mortgagee is not at liberty to disregard,



and he cannot discharge one after receiving notice of the paramount right of the other without liberating both.

As the right to exoneration depends on the wrong done by the creditor, it will not arise when the course of the latter is rightful, and a mere performance of his duty to the other parties to the contract. Hence, a security taken after the debt is contracted, for a temporary purpose, and with a stipulation that it shall be given back when that purpose is satisfied, may be restored in pursuance of the stipulation, without impairing or in any way discharging the liability of the surety. *The Pearl Street Society v. Imlay*, 23 Conn. 10.

In the cases hitherto considered, the discharge of the surety arose from the surrender or abandonment of the lien or securities held for the debt, and consequently had its origin in actual misfeasance, as distinguished from mere laches or negligence. But although the creditor has no duties to perform under ordinary circumstances, and will be safe so long as he refrains from acting in a way to injure the surety, he may be placed in a situation calling for active measures of precaution, and rendering him responsible for a want of due care or diligence. The relation ordinarily arising from a contract, is one of antagonism, rather than of trust and confidence, and a literal performance is all that can be claimed on either side. This is equally true where all the parties are primarily liable, and where one or more have contracted as sureties for the benefit of the rest. Hence, the surety is bound to fulfil the contract, or cause it to be fulfilled, and cannot complain, because the creditor does not seek a remedy for the breach. But the pledge or transfer of goods or assets, as a security for the payment of the debt, creates a new and different obligation, which rests wholly on the creditor, and makes him responsible for any injury that may be caused by his want of diligence. Under these circumstances the obligation imposed by the contract is coupled with another arising from the bailment, and a violation of the latter may to the extent of the resulting injury be set off against the former. It is well established that a bailee cannot, even where his office is purely gratuitous, remain passive, and will, on the contrary, be responsible for any loss that might have been averted by the exercise of timely care. And this is true, *a fortiori*, where the property of others is entrusted to him as security for the fulfilment of an obligation in which he is interested, and with an implied understanding that it shall be made available for the payment of the debt. Every one who accepts the custody of that in the preservation of which others are interested, is necessarily bound to act with a due regard to their safety as well as his own, and will, consequently, be responsible for a neglect by which they are injured, whether it take the form of a direct and active violation of right, or consists simply in a culpable inaction, resulting in a loss which might have been averted by a reason-

able degree of effort or precaution. In other words, every such person is a bailee, and answerable for the fulfilment of those duties which are well known to arise from a bailment. These are obviously the same, whether the bailment is collateral to a contract, and intended to guarantee its performance, or with a view to any other purpose; for nothing can be more obvious, than the interest of him who gives security for the fulfilment of an obligation, to have it applied to the purpose for which it is given, or restored in safety, if satisfaction is obtained from other quarters.

A distinction would, therefore, seem to exist between the remedies which are conferred by law, and those which are derived from the act of the parties. The former are rights which need not be pursued further than the creditor thinks fit, the latter, trusts held for the benefit of others as well as his own, and which must consequently be executed with good faith and diligence. In the one case, his duties are merely passive, in the other, they are so far active that he may be answerable for laches or supineness in the management of that which he has received. He may, therefore, refrain from issuing execution against the principal, even when his estate is manifestly diminishing in value, and becoming less adequate to meet his obligations. And the better opinion would seem to be, that he is not responsible for suffering a judgment to expire, or abandoning a lien acquired by an attachment or execution, unless the execution of the writ has gone far enough to operate as a virtual payment or satisfaction of the debt.

On the other hand, when a demand is assigned, a certificate of stock transferred, or a mortgage executed as collateral security, the creditor will incur nearly, if not quite, the same responsibility for the faithful administration of the assets delivered to his keeping, as if he were a guardian or trustee. *Pickens v. Warborough*, 26 Alabama, 417. Under these circumstances, the defence will not be confined to the surety, but may be taken advantage of by every one who has been prejudiced by a want of care or fidelity in the collection of the securities given for the debt. The law was so held in *Ex parte Mure*, 1 Coxe, 63, and the laches of the creditor in enforcing the payment of a bond, which had been transferred as collateral, said to entitle the obligor to a credit for all that might have been recovered by the exercise of due diligence. A similar decision was made in *Williams v. Price*, 1 Simon & Stewart, 581, and the loss occasioned by the stay of execution on a judgment which had been assigned as security thrown on the creditor. The court cited and relied on the authority of *Ex parte Mure*, but said that it was not necessary to adopt all the principles laid down in the course of that decision. But *Ex parte Mure* was closely followed in the case of *Sullivan v. Morrow*, 4 Indiana, 425, and the creditor held

responsible for delaying to enforce the payment of a note, which had been assigned as collateral, until the maker became insolvent.

It results from these decisions that if a man who receives assets of any kind, is not bound to active diligence, he is at least under an obligation not to suffer them to deteriorate in his hands, from a want of the care which a prudent man would exercise in the prosecution of his own business. *Muirhead v. Kirkpatrick*, 9 Harris, 237, 241; *Pickens v. Yarborough*, 26 Alabama, 417; *Trotter v. Crockett*, 2 Porter, 401, 413; *Russell v. Hester*, 10 Alabama, 536. "A bond or contract, which is transferred as a collateral security," said Woodward, J., in *Muirhead v. Kirkpatrick*, "is put under the dominion of the creditor, to make his claim out of it. His duties in respect to it are active. He is to employ reasonable diligence in collecting the money on the security and applying it to the principal debt, and the conversion of it into a less security, is such misuse as makes him accountable to the debtor." In this instance the loss arose from misfeasance, but the language of the court implies that the creditor would have been answerable for negligence or laches.

The obligation is not less where a surety is in question, who must be discharged by any act which exonerates the principal debtor. *Pickens v. Yarborough*. Thus in *Capel v. Butler*, 2 Simons, 457, where the failure of the creditor to record a bill of sale of a vessel, which had been executed by the principal as a security for the debt, enabled a subsequent purchaser to obtain priority, the court held, that the loss should be borne by the person to whose neglect it was attributable, and deducted the full value of the vessel from the demand against the surety. This case was followed in *Watson v. Alcock*, 19 English Law & Eq. 64, 239, and the exoneration of the surety held to result from the laches of the creditor, in not entering a warrant of attorney given by the principal. It is not easy to define the obligation arising under these decisions, or to know when the creditor should be answerable for delay or laches as distinguished from misfeasance. *Richards v. The Commonwealth*, 4 Wright, 146. But while there may be a doubt as to what constitutes negligence, there is none that where it is shown to exist the loss should be thrown on the person who is in default. *Beale v. The Bank*, 5 Watts, 529; *Harper v. Kean*, 11 S. & R. 280; *Trotter v. Crockett*, 2 Porter, 401, 413; *Russell v. Hester*, 10 Alabama, 536; *Lyons v. The Huntingdon Bank*, 12 Id. 61; *Muirhead v. Kirkpatrick*, 9 Harris, 237 (ante, 288, 291). This point arose in *Lawrence v. McCalmont*, 1 How. 426, where the court said, that the holder of negotiable paper is bound to use reasonable, but not extreme diligence, to give notice to those who without being parties to the instrument, will yet be losers if it is not paid.

The duty of the creditor is, however, limited in general to keeping

the securities taken for the debt intact for the benefit of the surety, and he is not, save in rare and exceptional instances, bound to guard against a possible or probable deterioration from lapse of time or insolvency, by bringing suit or taking active measures for their conversion into money. *Clark v. Young*, 1 Cranch, 181. He is consequently not bound to proceed to judgment and execution, and will be freed from responsibility on tendering the security in the same condition that it was when received, without any change arising from his act or default. *Trotter v. Crockett*; *Ormsby v. Fortune*, 16 S. & R. 302. When, however, a suit against the maker is made necessary by statute to bind the endorsers, the duties of the creditor will receive a corresponding extension, and he may be answerable for a failure to keep the instrument alive by proceeding upon it in due season. *Russell v. Hester*, 10 Alabama, 556. A distinction has also been taken between the transfer of assets as a pledge and as collateral security, and it has been said that the creditor is under an obligation in the latter case, which does not arise in the former.

It is obvious from what has been said, that the relation of the principal to the securities held for the debt, is like that of the surety towards the principal, each being entitled to substitution on payment and discharged if the right is prejudiced. *Harberton v. Bennett*, 1 Beatty, 386. An agreement to suspend or enlarge the obligation of a bond or other collateral security will have the same effect on the liability of the debtor as if he were a mere surety, and time had been given to the principal contractor. In *Southwick v. Saxe*, 9 Wend. 122, and again in *Nexsen v. Lyell*, 5 Hill, 466, the defendant was accordingly held to be discharged by the act of the plaintiff in extending notes, which had been transferred to him as security. In this point of view it does not matter whether the debtor has been injured; it is enough, as in the analogous case of time given to a principal, that his rights and remedies are varied, and he himself placed in a different position from that which he agreed to occupy. *The New Hampshire Savings Bank v. Colcord*, 15 New Hampshire, 119. This conclusion is, however, a departure from the rule that compensation should be proportionate to damage, which can only be excused by the difficulty of finding any measure of the loss, short of the whole value of the security or property which has been hypothecated or endangered by the act of the creditor; *Holt v. Bodey*, 6 Harris, 207; and hence, whenever the injury is susceptible of exact measurement or computation, the relief of the debtor will be limited to what is strictly necessary for his indemnity or protection, whether his liability is primary or secondary. *Everly v. Rice*, 8 Harris, 297.

As the right to relief is commensurate with, and dependent on, the real or supposed loss, the surety will not be discharged in any case,

where it can be shown beyond all reasonable doubt, that he is not injured, or that the act of the creditor worked no real change in the securities held for the debt. *Payne v. The Commercial Bank of Natchez*, 6 Smedes & Marshall, 24. Hence, a defence founded upon the surrender of a bond or other chose in action, without the consent of the surety, may be rebutted by proof that it was forged or fraudulent, and could not have been enforced against the obligor; *Loomis v. Fay*, 24 Vermont, 240; and as the withdrawal of a levy upon the property of the principal, merely entitles the surety to a credit for the value of the property levied upon, its subsequent sale, followed by the appropriation of the proceeds to the discharge of the debt, will give him all that he has a right to ask, and be a sufficient answer to any subsequent complaint which may be made at law or by a bill in equity *Ward v. Vass*, 7 Leigh, 135. This view is sustained by *Neff's Appeal*, 9 W. & S. 36, where the right to relief was said to be in the direct ratio of the damage done, and to fail altogether, when the existence of injury is conclusively disproved or negatived. And it was, consequently, decided, that a defence founded on a release of part of a tract of land belonging to the principal from the lien of a judgment, might be rebutted, by proof that the whole value had been applied to the discharge of a prior incumbrance, so that the transaction was to the advantage of the surety rather than his detriment.

"The ground," said Sergeant, J., "upon which the relinquishment, or negligent losing of a security, taken of the principal debtor by the creditor for the whole or part only of the debt, is held to be a release of the surety either for the whole or *pro tanto*, as the case may be, is, that the surety, upon payment of the debt to the creditor, is entitled to the benefit of all securities which the creditor has, that he could have rendered available against the principal debtor; and if any of those securities have become lost, or have become lessened in value in consequence of the neglect or default of the creditor, the surety's liability to the creditor will be diminished to that extent. Vide Pitman on Principal and Surety, 113, 114; 40 Law Lib. 86; Theobald on Principal and Surety, 84, 85, &c.; *Commonwealth v. Miller*, 8 Serg. & Rawle, 452, 457, 458; 2 Swanst. 189. When the real value of the security, lost by the neglect of, or given up by the creditor, is capable of being ascertained with certainty, and it is less than the amount of the debt, it would not only be contrary to reason to extinguish the liability of the surety entirely, as a diminution equal in extent to the value of the security given up or lost, is amply sufficient to protect him from any loss that could accrue from his not obtaining such security, which is the utmost that he can with reason claim; but it would likewise be repugnant to the ground or principle upon which the surety has a right to claim a discharge from his liability as such. But when it is im

practicable to ascertain, with any degree of certainty, whether the security lost or relinquished might not have availed the surety to the full extent of the debt, in case he had paid it, it would seem to be right that he should be discharged entirely from all liability, and that the burden of proving the value of the security should lie on the creditor. In the present case, however, although it appears that Mrs. Wilcox released thirty acres of the land of the principal debtor from the lien of her judgment, yet it was done for the purpose of increasing the value of the security, and, in this respect, rendering the lien more certain, which she had for the payment of the debt, instead of lessening it; and in the opinion of the auditor, and according to the evidence given before him, this would seem to have been the effect of what she did; that by making a small portion of the tract pay the mortgage debt, which was an incumbrance upon the whole tract, prior in date to the lien of her judgment, and might at a forced sale have swept away the whole tract to pay it, it was in fact a charge upon the whole tract of land; and from all that appears in the case, the land was the only resource from which payment of it could be obtained, so that Mrs. Wilcox had no alternative which seemed so well suited to preserve at least a portion of the land as a security for the payment of her judgment, as that of releasing the thirty acres from the lien of it. It may, therefore, be very properly considered an improvement of her security, instead of a diminution of it."

It follows that a defence founded on the surrender of a collateral security may be rebutted by proof, that it was exchanged for another of equal or greater value; *Thomas v. Cleaveland*, 33 Missouri, 126; and such is clearly the rule when the security is obtained on the faith of an agreement, that the debtor shall be entitled to withdraw it and substitute another of a different kind. *The Pearl Street Society v. Imlay*, 23 Conn. 10. So also an offer to place the judgment at the disposition of the surety and be guided by him in the collection of the debt, will be a *prima facie* if not conclusive answer to an allegation, that the creditor was guilty of laches in not proceeding to execution against the principal, *Hubbell v. Carpenter*. In like manner, while the relinquishment of a judgment or other security held by the creditor, will ordinarily discharge the surety, the presumption of injury on which the defence depends, may be overcome by proof that the rights of the latter were reserved and might have been enforced notwithstanding the surrender. *Hubbell v. Carpenter*, 1 Selden, 18. The burden of proof, however, is in such cases on the creditor who will fail unless he can repel the hostile inference arising from his conduct. *Nexsen v. Lyell*, 5 Hill, 466; *Harberton v. Bennett*, 1 Beatty's, Irish, Ch. 386; *The Saving Bank v. Colcord*, 15 New Hampshire, 119; *Holt v. Bodey*, 6 Harris, 207, 215.

The principle is a general one, applying wherever the plaintiff has by negligence or misfeasance deprived the defendant of a means of indemnity, to which he would be entitled on payment. A surety may forfeit the right to reimbursement by wasting or mismanaging the assets which he has received as a counter security from the principal. A covenant not to sue one of several promisors or contractors, may be pleaded as an equitable discharge by the rest. When land is liable in the inverse order of alienation, a release of the second purchaser may discharge the first; 2 *Leading Cases in Equity*, 271; and in *Holt v. Bodey*, 6 Harris, 207; a release of the land of one obligor from the lien of a judgment on the bond, was held to exonerate the other, although he had executed the instrument as a principal and was not known by the obligee to be a surety.

This decision may, however, well be questioned. A contractor merely as such is not entitled to subrogation; *Hogan v. Reynolds*, 21 Alabama, 56; *Baily v. Brownfield*, 8 Harris, 41; and consequently will not be discharged by the relinquishment of a remedy to which he had no claim. See *Rice v. Morton*, 19 Missouri, 263; 1 *Leading Cases in Equity*, 145, 3 Am. ed.

Although the creditor is not bound in general to take active measures to collect the debt, such a duty may be imposed by statute, and he will then be answerable for a failure to fulfil it. In *Clark v. Hill*, cited 9 Vermont, 147, a bill was filed by a surety, asking that certain notes on which he was liable might be delivered up by the creditor, on the ground of the refusal of the latter to produce or prove them before the commissioners in bankruptcy, to whom the estate of the principal had been referred. The prayer of the complainant was granted, because the assets, though sufficient to pay the debt, were exonerated by the failure to proceed at the proper time. A similar question arose in *McCollum v. Hinckly*, 9 Vermont, 143, where the complainant sought to enforce a debt which had been discharged by the failure to prove it within the time required by law, by filing a bill against the executor and the surety, founded on the legal liability of the surety and the equity of the latter to be reimbursed out of the estate. The court, however, held, that as the estate was not directly answerable it could not be reached through the surety, whose liability ceased with the principal obligation. These decisions are, however, exceptional; and it is well settled on general principles that the failure of the creditor to prove the debt against a bankrupt or insolvent principal will not discharge the surety, who may appear himself, and take the necessary measures, if they are omitted by the creditor. *Bank of Manchester v. Bartlett*, 13 Vermont, 315; *Jackson v. The Planters' Bank*, 4 Smedes & Marshall, 165; *Cohen v. The Commissioners of the Sinking Fund*, 7 Id. 437; *Mitchell v. Williamson*, 6 Maryland,

211; *Sibley v. McAllaster*, 8 New Hampshire, 889; *Sascer v. Young*, 6 Gill & Johnson, 243; *Whitridge v. Durkee*, 2 Maryland Ch. Decisions, 442.

The question underwent a close examination in *Schroepel v. Shaw*, 3 Barb.; 3 Comstock, 446, where it was held that while the creditor must not impair the remedies for the debt, he is under no obligation to render them effectual. The surety succeeded, on payment, to the remedies of the creditor and might protect himself. His failure to pursue this course was a default, which precluded him from complaining of the laches of others. There was, moreover, a natural reluctance to press a failing debtor to the wall. The instant collection of the debt might be compelled by a notice in pais or a bill in equity. If the surety would not assume the responsibility it ought not to be thrown upon the creditor. "The ground," said Harris J., in delivering the opinion of the Court of Appeals, "upon which the surety claims that he is, in equity, entitled to be discharged from his liability, is the alleged gross negligence of the defendant in the collection of the bond and mortgage assigned to him as collateral security for his debt. In the consideration of this question, I shall, at least for the present, assume it to be true, as the plaintiff alleges, that by the exercise of promptness and vigilance, the defendant might have secured the payment of the bond and mortgage, and thus have relieved the plaintiff from his liability.

"In considering the obligation of the parties to each other, as creditor and surety, it is to be borne in mind, that the plaintiff had, by signing the note, guarantied that his principal should, in one year from the date of the note, pay the amount, with interest, to the defendant, or that he would himself be liable for its payment. Before the first instalment upon the bond and mortgage had become payable, the note had become due, and the plaintiff, as well as his principals, was in default.

"The right of the defendant to sue the plaintiff for the recovery of the note at any time after it became due, will not be denied. Suppose a suit had been brought, and judgment had been recovered, before the alleged default of the defendant, in not securing the payment of the bond and mortgage, had occurred, can it be pretended that the subsequent neglect of the defendant could have the effect of an equitable discharge of the plaintiff's liability to pay the judgment? It seems to me, that to sustain this bill, it is necessary to violate one of the cardinal principles of equity. The plaintiff was the party first in default. If he had performed his obligation to the defendant, he would have had the control of the bond and mortgage before any part of it became due. There was no time after the first instalment upon the bond and mortgage became due, when the plaintiff was not in de-



fault, and liable to be sued for such default. To allow him to take advantage of any want of diligence in the defendant in collecting the bond and mortgage under such circumstances, seems very much like allowing a man to take advantage of his own wrong. If the defendant was guilty of negligence, the plaintiff was guilty of a positive omission of duty. The defendant was under no higher obligation to collect the bond and mortgage, than the plaintiff was to pay the note, and take the bond and mortgage himself.

"But let us consider more attentively what constitutes such gross negligence as will operate to discharge a surety, when he is not himself in default. A surety has an undoubted right, upon the payment of the debt, to have the full benefit of all the collateral securities which the creditor has taken as an additional pledge for his debt. 'It is hardly possible,' said Lord Brougham, in *Hodgson v. Shaw*, 3 M. & K. 190, 'to rate this right of substitution too high.' 'The surety,' says Chancellor Kent, 'by his very character and relation of surety, has an interest, that the security taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. The creditor must do no wilful act, either to poison it, in the first instance, or to destroy or cancel it afterwards.' *Hays v. Ward*, 4 John. Ch. 130. 'But this qualification should be added, says Story, 'that a mere omission by the creditor to collect the debt due of the hypothecated property, so that it is lost by his laches, will not discharge the sureties. The creditor must be guilty of some wrongful act, as by a release, or fraudulent surrender, of the pledge, in order to discharge the surety. Story's Eq. §§ 501, 639.

"Thus, it will be seen, that, in reference to collateral securities, the rule is the same as in reference to the collection of the debt of the principal debtor. The creditor is under no obligation of active diligence for the protection of the surety, so long as the surety himself remains inactive. Until the surety moves in the matter, it is enough that the creditor holds himself in readiness to transfer to him, when he applies, all the securities he holds, that he may have the benefit of such securities in aid of his own responsibility."

A similar view was taken in *Hampton v. Levy*, 1 McCord's Ch. 107, and *Laing v. Brevard*, 3 Strobbart's Eq. 59, and the surety held not to be exonerated by the laches of the creditor in not recording a mortgage, which had been given as security for the debt. "Were the question here raised *res integra*," said the chancellor, "in our courts, it might well be considered a debatable one. Even in that case, however, upon a careful collation and review of the English and American authorities, I think I should be led to the same conclusion, to which I am constrained by the solemn adjudications of our own tribunals. This case is

in no way to be distinguished, by the most critical comparison, from that of *Hampton v. Levy*, where the identical question was made, upon precisely the same state of facts, and where, after the same course of argument here urged, the decision of the court was, that the surety was not discharged by the omission of the creditor to record the mortgage of the principal debtor. The case of *Smith v. Turner* is, if not a stronger case, one equally as strong against the surety. There Gibbs, the master in equity, selling property under a decree in chancery, took no mortgage at all; though it was part of the published conditions of the sale, that in addition to the personal security, a mortgage of the premises would be required; and if the conditions were not complied with within a month from the day of the sale, the property was to be resold at the risk of the first purchaser. And it was not shown that the surety sanctioned, or was aware of, the waiver of or omission to take a mortgage, in pursuance of the conditions of the sale. The surety in such a case might with great force and plausibility exclaim, *non hæc in fœdera veni*. But on application to this court, he was held not to be discharged. And if an omission to take any mortgage, when it was a part of the stipulation that one should be taken, does not discharge the surety, it is difficult to perceive why the omission to record a mortgage actually taken, could have that effect. Certainly the interests of the surety are less jeopardized in the latter case, inasmuch as, at the date of these occurrences, an unrecorded mortgage would have prevailed against a subsequent judgment, or any other incumbrance, except a subsequent mortgage duly recorded. The prominent and well-defined distinction that pervades all the cases that may be deemed authoritative on this subject, is, that the surety will be discharged by any acts on the part of the creditor of a positive character, whereby the remedy against the principal debtor is lost; so that payment cannot be enforced against him. Such would be the case where, on the part of the creditor, there was a destruction, abandonment, or waiver of counter securities. If the creditor, for a consideration, and by a binding stipulation, gives time to the principal debtor, without the consent or concurrence of the surety, the latter will be discharged, though the principal debtor is perfectly solvent. This is not only a positive act on the part of the creditor, but it is a new contract, to which the surety is no party. For acts of mere passive sufferance, omission, and delay, the surety will not be discharged. And this rule is the more reasonable, inasmuch as a surety thus aggrieved, has the remedy in his own hands; and by various alternative modes of procedure, may redress himself. He may convert the passive indulgence and delay of the creditor into a positive wrong, by demanding that he proceed to the collection of his debt. If the requisition be not complied with, in a reasonably diligent manner, and the principal becomes insolvent, it will afford ground for relief.

The doctrine here asserted is not involved in this case, and has never been judicially recognized by the courts of this State. But it is fully affirmed in the well considered cases of *King v. Baldwin*, and *Pain v. Packard*. The judgment in the case first cited, was the result of much elaborate consideration, and the principle involved was this: Where the creditor did an act injurious to the surety, or omitted to do an act, when required, which equity and his duty to the surety enjoined upon him to do, and which omission was injurious to the surety, in either of these cases the surety would be discharged. And accordingly, in that case, the creditor was adjudged to have lost his claim against the surety by having refused or omitted, at the request of the surety, to proceed against the principal. I am authorized to say, that a majority of this court are prepared to adopt the principle of this decision, and to extend similar relief to a surety under the like circumstances. Another remedy, which a surety might have against a too indulgent creditor, would be, on the *quia timet* doctrine, to file a bill in this court, both against his principal and the creditor, and to compel the latter to accept payment, or to proceed to the recovery of a judgment. *Nesbit v. Smith*; *King v. Baldwin*. Or, the surety might, in consistency with the terms of his own contract, pay the debt of his principal, and bring an action at law against him, to recover the amount. In the case we are considering, Alfred Brevard, if he had been himself active and vigilant, might have easily discovered that the mortgage was not recorded. He might have demanded that the mortgagee should have it recorded, or that it should be delivered to him for that purpose. If this legitimate demand were refused, and injury had resulted to the surety, from the non-registry of the mortgage he would have been entitled to relief. In not pursuing this course, he has not himself been vigilant, and the maxim, *vigilantibus* and *non dormientibus*, &c., applies."

It was held in like manner in *Ormsby v. Fortune*, 16 S. & R. 302, that a recovery could not be had against the defendant, for his failure to collect a note which had been placed in his hands as security, although the delay resulted in the insolvency of the maker, and consequent loss of the debt. The court said, that the duty of the creditor was limited to the safe-keeping of the assets intrusted to his care, and that he was not bound to take active measures without a request to that effect from the debtor. The principle is the same where the negligence of the creditor is set up as a defence, because the right of the plaintiff ought not to be barred by an alleged tort, for which he would not be liable in damages as a defendant. *Trotter v. Crockett*, 2 Porter, 401; 2 Smith's Leading Cases, 751, 6 Am. ed.

It results from the same principle that even where the means of payment are in the hands of an administrator or assignee, and may

be had for asking, his sureties will not be discharged by the failure of the creditor to present the demand until the principal becomes insolvent, because it is always in their power to require instant measures, and they cannot complain of a delay which they have sanctioned by acquiescence. *Richards v. The Commonwealth*, 4 Wright, 146.

It might have been supposed that the decision of the chancellor on the second point involved in *King v. Baldwin*, was a necessary consequence of the first, and that as a surety is bound to pay the debt or cause it to be paid, he could not throw any part of the obligation on the creditor. And such, unless in rare and exceptional instances, is no doubt the true rule in equity as well as at law. *Wright v. Simpson*, 6 Vesey, 714.

"The surety," said Lord Eldon, in *Wright v. Simpson*, "is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor. But in late cases, provided there was no risk, delay, or expense, as in the case put, of the money in the next room, indemnifying against the consequences of risk, delay, and expense, the surety has a right to call upon the creditor to do the most he can for his benefit; and the latter cases have gone farther. It is now clear that if the surety deposits the money, and agrees that the creditor shall be at no expense, he may compel the creditor to prove, under a commission of bankruptcy, and give the benefit of an assignment in that way."

It follows from what is here said that the surety stands in the position of an equitable assignee, and may use the remedies of the creditor at his own risk and cost. He may, accordingly, file a bill against the principal, to compel him to pay the debt at maturity, and make the creditor a party, because his interests are at stake, and in order that he may be at hand to receive the money. *Ranelagh v. Hayes*, 1 Vernon, 190; 1 Equity Cases, Abr. 79, pl.; Pitman on Principal and Surety, 125; *Tankersly v. Anderson*, 4 Dessausure, 44; *Moore v. Brindsley*, 8 Wend. 194; *Marsh v. Pike*, 1 Sandford's Ch. 210, 212; 10 Paige, 595; *Stephenson v. Taverner*, 9 Grattan, 398; *Hale v. Wetmore*, 4 Ohio, N. S. 600; *Woolridge v. Norris*, 6 Law Reports Eq 412.

The creditor may also be bound to institute legal proceedings, or rather to suffer his name to be used for that purpose by the surety. This is, however, only where, as under the former bankrupt laws of England, the surety cannot proceed directly and the refusal of the creditor to prove the debt, will be attended with the loss of the right of recourse against the estate of the principal. *Wright v. Simpson*, 6 Vesey, 714, 734; *Ex parte Matthews*, Ib. 285; *Ex parte Rushworth*, 10 Id. 409; *Ex parte Rogers*, 4 Deacon & Gex, 623. It seems, moreover, to have been thought, in some instances, that the surety may compel the creditor to sue the principal under ordinary circumstances, without

basing his application on any specific equity; *Nesbit v. Smith*, 2 Brown's Ch. Cases, 579; *Hayes v. Ward*, 4 Johnson's, 123, 132; *Sascor v. Young*, 6 Gill & Johnson, 243; *Whitridge v. Durkee*, 2 Maryland Chan. 442; but these dicta were foreign to the point actually before the court, and *King v. Baldwin* was the first well-considered decision in which the creditor was held to be under an obligation to enforce the fulfilment of the contract without being indemnified, or submit to the loss of all remedy against the surety. The question arose *In re Babcock*, 3 Story, 93, on a petition filed by an assignee in bankruptcy, to compel the holder of a bill which had been accepted by the bankrupt for the accommodation of the drawer, to proceed against the latter before claiming a dividend from the estate. The relief given was, however, limited to a decree that the creditor should sue the principal, or suffer a suit to be instituted in his name by the assignee. The court relied on the well-settled rule that an accommodation maker or acceptor is not entitled to the privilege of a surety, even when he was known to be such by the creditor. But it was also held, that if the surety wishes the aid of the creditor he must take the risk and expense on himself.

"There is," said Story, J., "no doubt that a surety for a debt may, in many cases, be entitled to relief, by requiring the creditor to proceed against the principal. But this is ordinarily limited to cases where his character as surety stands confessed upon the face of the instrument itself, and also where he offers to indemnify the creditor in his proceedings against the principal, and also offers to pay whatever the principal may fail to pay under those very proceedings. This is the common course where the surety seeks, by a bill against the creditor and the principal, to compel the latter to exonerate the surety from losses which may otherwise be sustained by him, by the delays and forbearance of the creditor, in enforcing his debt upon a similar ground. If the creditor, in the case of the bankruptcy of the principal, has not proved his debt against him, but declines to do so, a court of equity will, upon a bill filed by the surety, compel the creditor to prove his debt in bankruptcy, and give the surety the benefit thereof; but then, in such a case, the relief is granted upon the terms that the surety brings the amount due into court; and if the creditor has himself already proved his debt in bankruptcy, the surety will have a right, upon payment of the debt, to stand in equity, as substituted to the rights of the creditor, and will be entitled to the dividends."

There is the less reason for holding the surety entitled to compel the creditor to sue, that he has an undoubted right to require the principal to pay the debt when due, which may be enforced by bill, and he should therefore proceed directly in his own name without calling on the creditor, unless the circumstances are such as to render the aid of the

latter necessary. 2 Story's Equity Jurisprudence; see *Fuller v. Loring*, 42 Maine, 481, 489; Pitman on Principal and Surety; *Hayes v. Ward*, 4 Johnson's Ch. 132; *Bellows v. Lovell*, 5 Pick, 30.

The reasoning of Chancellor Kent, in *King v. Baldwin*, may therefore justly claim a superiority of principle over the judgment by which it was reversed. See *Kendrick v. Borst*, 4 Hill, 630; *Cope v. Smith*, 8 S. & R. 110. The simplicity and certainty of the rule laid down in the court above, and the facility with which it may be applied as contrasted with the delay and expense of an application to chancery, have, however, caused it to be adopted not only in New York, but in some of the other States of the Union; *Manchester Iron Manufacturing Co. v. Sweeting*, 10 Wend. 162; *Bruce v. Edwards*, 1 Stewart, 11; *Goodman v. Griffith*, 3 Id. 168; *Towers v. Riddle*, 2 Alabama, 694; *Thompson v. Watson*, 10 Yerger, 362; *Hempstead v. Watkins*, 1 English, 517; *Cope v. Smith*, 8 S. & R. 110; *Laing v. Brevard*, 3 Stroblhart, 57; *Strader v. Haughton*, 9 Porter, 334; while there are others in which the Legislature have established it with more or less modification by statute (post, 416).

It is well settled, however, even under this course of decision, that the surety will not be discharged by a failure to proceed against the principal, unless the latter was solvent when the request was made, and became insolvent subsequently to the period at which judgment could have been recovered, and the money made by the creditor. The burden of showing this is on the defendant, who must establish the injury with as much certainty as the request. *Beardsley v. Warner*, 6 Wend. 610; 8 Id. 194; *Huffman v. Hurlburt*, 13 Wend. 377; *Kendrick v. Borst*, 4 Hill, 630. To make a request to proceed against the principal binding on the creditor, it must also be accompanied with the tender of an indemnity against the costs and charges of the suit. *Warner v. Beardsley*; *Bellows v. Lovell*, 5 Pick. 307. In Pennsylvania, however, the want of such an offer will not invalidate the request unless it is specifically assigned by the creditor as the reason for his refusal to comply. *Wetzler v. Sponsler's Ex'rs*, 6 Harris, 450. There can, however, be little doubt, that if the creditor places all the securities and remedies for the debt at the disposal of the surety, it is all that the latter can require. His equity is not so much to compel the creditor to proceed, as to be allowed to proceed in the creditor's name at his own risk.

In *Cope v. Smith*, 8 S. & R. 110, the cases of *Pain v. Packard*, and *King v. Baldwin*, were reviewed by Chief Justice Tilghman, who seems to have inclined to the view taken by the chancellor in the court below. But it was at the same time decided that inasmuch as there was no court of equity in Pennsylvania, a notice in *pais* must from necessity be substituted for the more formal remedy by bill, and the

surety held to be discharged by the refusal of the creditor to do what equity would have enjoined. It was, however, said that to constitute a defence, the request must be proved beyond doubt, be explicit in terms, and be accompanied by a declaration, that the surety would hold himself discharged if it was not fulfilled; *Gardner v. Ferree*, 15 S. & R. 28; and in *Weiler v. Hoch*, 1 Casey, 525, it was held to be a sufficient excuse for a failure to proceed forthwith, that the principal became insolvent and made an assignment for the benefit of his creditors before the period at which judgment could have been obtained by the exercise of the utmost diligence. When, however, the creditor failed to obtain judgment until the real and personal estate of the principal was sold by the sheriff, or bound by the lien of other incumbrances, it was held to exonerate the surety, although the notice to proceed came from an agent acting under a general authority, and not specially empowered for that purpose. *Wetzler v. Spousler's Ex'rs*, 6 Harris, 460.

It has been held in New York, that the disregard of a request to sue the principal will exonerate the surety, even when the creditor has no reason to believe that the principal is in failing circumstances, or that the delay will be injurious in any other particular. *Remson v. Beekman*, 25 New York, 55. The authorities there, however, agree with those in Pennsylvania, that the gist of such a defence is the loss of the debt through the delay and subsequent insolvency of the principal. *Shimer v. Jones*, 11 Wright, 268; *Thompson v. Hall*, 45 Barb. 214. The law does not require anything vain or useless, and will not require the creditor to proceed against a man who is insolvent, and has no effects that can be reached by process. As the defence operates as a forfeiture, it should, moreover, be made out distinctly. *Woolshlare v. Searles*, 9 Wright, 49, and the notice will not be sufficient unless the creditor is summoned unmistakably to adopt legal measures for the collection of the debt. *Greenawalt v. Kreider*, 3 Barr, 264; *Wilson v. Glover*, Ib. 404; *Shimer v. Jones*, 11 Wright, 268; nor unless there is an equally explicit notification that if he fails to do so, the surety will hold himself discharged. *The Erie Bank v. Gibson*, 1 Watts, 143; *Heller v. Crawford*, 8 Wright, 105. Any words which convey the meaning clearly will, however, be sufficient. *Strickler v. Burkholder*, 11 Wright, 476, and when the guarantor told the creditor "to collect the debt, as he would not stand bail any longer," it was held to be a discharge.

The doctrine of *Pain v. Packard* is generally repudiated in this country, as contrary to the true interpretation of the contract which requires the party who incurred the obligation to see that it is fulfilled. Such, at least, is the view taken in Maine, Vermont, New Hampshire, Connecticut, Ohio, Indiana, New Jersey, Maryland and some of the other States; *Hubbard v. Davis*, 1 Aiken, 296; *Montpelier*

*Bank v. Dixon*, 4 Vermont, 599; *Baker v. Marshall*, 16 Id. 25; *Hickok v. The Farmers' Bank*, 35 Id. 476; *Page v. Webster*, 15 Maine, 269; *Mahurin v. Pearson*, 8 New Hampshire, 539; *Bull v. Allen*, 19 Conn. 101; *Pintard v. Davis*, 1 Zabriskie, 632; 1 Spencer, 205; *Sascor v. Young*, 6 Gill & Johns. 243; *Broughton v. Duval*, 3 Call, 61; *Dennis v. Rider*, 2 McLean, 451; *Carr v. Howard*, 8 Blackford, 191, and *Jenkins v. Clark*, 7 Hammond, 72; and, as it would seem in Massachusetts, *Frye v. Barker*, Pick.; *Bellows v. Lovell*, 5 Id. 307; *The Adams' Bank v. Anthony*, 18 Id. 208; although it seems to have been thought in *Bellows v. Lovell* that the creditor is bound to sue on receiving an indemnity. In some of the States, however, the right to require the creditor to proceed against the principal, on pain of forfeiting his remedy against the surety, has been conferred by statute. *Cockrell v. Dye*, 33 Missouri, 365; *Ward v. Stout*, 32 Illinois, 399; *Taylor v. Davis*, 38 Miss. 493; *Wright v. Stockton*, 5 Leigh, 53; *Parish v. Gray*, 1 Humphreys, 88; *Braman v. Hawk*, 1 Blackford, 393; *Reid v. Cox*, Ib. 312; *Nichols v. McDowell*, 14 B. Monroe, 6; *Moreland v. The State Bank*, 1 Breese, 207; *Towns v. Riddle*, 2 Alabama, 694; *Howard v. Brown*, 3 Georgia, 523; *Bolton v. Lunday*, 6 Missouri, 46; 17 Id. 399. These enactments are in general strictly construed as contrary to the course of the common law; *Jenkins v. Clark*; *Parish v. Gray*; *Howard v. Brown*; and in *Taylor v. Beck*, 13 Illinois, 376, the court held, that a statute which was limited in terms to bonds, bills and notes for the payment of money or delivery of goods, did not include contracts of a different description. But in Alabama, Tennessee, and, as it seems, Arkansas, the disregard of a verbal request to sue may discharge the surety, although the statute speaks of a written notice. *Strader v. Houghton*, 9 Porter, 334; *Brice v. Edwards*, 1 Stewart, 11; *Goodman v. Griffin*, 3 Id. 58; *Towns v. Riddle*, 2 Alabama, 694; *Shuham v. Hampton*, 8 Id. 942; *Hempstead v. Watkins*, 3 Arkansas, 317; *Thompson v. Watson*, 10 Yerger, 362.

In *Wright v. Stockton*, 5 Leigh, 143, disregard of a notice given by a surety, was held not only to exonerate him, but also to discharge his co-sureties by depriving them of the right to contribution; but the question arose in this case under a statute, and the result might have been different, had it depended solely on general principles. And in *Routon v. Lacy*, 17 Missouri, 399, where the point arose under similar circumstances, the exoneration was limited to the amount, for which the surety, who had given the notice, would have been liable.

If the surety may call on the creditor to sue the principal, a principal debtor should be entitled for a like reason to require that proceedings shall be instituted for the collection of the collaterals given for the debt.



It has sometimes been contended that as the surety is only secondarily liable, the creditor should be restrained from suing him until it has been ascertained whether the debt can be collected from the principal. This would, however, be contrary to the well-settled practice of equity, not to delay or hinder the creditor in marshalling assets for the benefit of the debtor. The right to quicken the creditor obviously affords no foundation or analogy for an application tending to delay. *Abercrombie v. Knox*, 3 Alabama, 728. It is accordingly well settled that if the creditor is bound to sue the principal, he may also proceed simultaneously against the surety, and go on to judgment and execution with as much speed as the forms of law will allow. *Noyes v. Nichols*, 2 Williams, 159; *Fuller v. Loring*, 42 Maine, 481. The surety is entitled to subrogation, but in order to avail himself of this right he must pay the debt. *Wright v. Simpson*, 6 Vesey, 714; *The Ins. Co. v. Smith*, 1 Jones, 127; *Abercrombie v. Knox*, 3 Alabama, 728.

In *Hawk v. Geddis*, 16 S. & R. 23, the existence of a judgment against the principal, which bound land of greater value than the debt, was held to be a sufficient reason for staying an action against the surety, but this decision was overruled in *Geddis v. Hawk*, 1 Watts, 200, and the surety said to have no right to delay the creditor who had been already injured by his default. It was decided in like manner in *Crocker v. Gilbert*, 9 Cushing, 31, that an entry under a mortgage, was not a defence to a suit on a guaranty of the accompanying bond. The mortgage was said to be a mere collateral, which might afford the means of payment, but did not satisfy the debt, and the entry of the creditor under it was no reason why the guaranty should not be punctually fulfilled.

Although the existence of a remedy against the principal is not a reason for suspending proceedings against the surety, the court may, notwithstanding, throw the burden where it should ultimately rest, by directing that the assets of the principal debtor shall be seized and sold in the first instance, and staying proceedings against the surety if the proceeds of the sale are adequate to meet the debt. This should, however, only be done where both funds are so directly within the reach of the creditor, that confining him to one will not involve the risk of losing the other. *Wright v. Simpson*, 6 Vesey, 714. The creditor is, moreover, entitled to his money at the day, and no intervention can be just or equitable which delays the collection of a demand that is already overdue. In *Holditch v. Mist*, 1 P. Wms. 695, the court were asked to stay proceedings at law on the ground that as the property of the complainant had been taken from him and vested in commissioners for the benefit of his creditors, recourse should be had to them in the first instance, but the injunction was refused.

The case of *Wright v. Nutt*, 1 H. Bl. 136, is in some respects con

trary to these principles. The property of an American loyalist had been confiscated by the State of Georgia, subject to his debts, which were to be discharged out of the assets. As this means of payment was dilatory and uncertain, his creditors followed him to England, and instituted legal proceedings there, which the bill was filed to restrain. Lord Thurlow held, that inasmuch as there was a fund for the discharge of the debt which the creditor could reach and the debtor could not, the case was an exception to the general rule, that the existence of one remedy does not preclude the right to enforce another. The relief prayed for was accordingly given. In *Folliott v. Ogden*, 1 II. Bl. 123, Lord Loughborough expressed his concurrence with this decision, but held that such a defence was not good at law. When, however, the question arose subsequently, in *Wright v. Simpson*, 6 Vesey, 714, Lord Eldon said that it was not enough that the complainant could not have recourse to the assets in the United States, it should also appear that they were adequate to satisfy the respondent. It would obviously be unjust to deprive him of redress in an English court, unless he had a prompt and certain remedy elsewhere.

It is well settled, in accordance with the decision in *King v. Baldwin*, that the extension of legal jurisdiction at law will not oust that of chancery. *Tomlinson v. Price*, 5 Vesey, 235, 238; *Kemp v. Pryor*, 1 Id. 327; *Mayhew v. Cricket*, 2 Sweatton, 185, 189; *Viele v. Hoag*, 24 Vermont, 46, 51; 2 Leading Cases in Equity, part 2, 188, 3 Am. ed. (ante, 274). The powers of the latter court would otherwise be fluctuating and uncertain, and diminish with each advance of the courts of law. This court, said Lord Eldon, will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to have fallen in love with the same or a similar jurisdiction, and has attempted to administer it more or less successfully. *Eyre v. Everitt*, 2 Russell, 381. A surety may accordingly seek relief in equity, although the facts set forth in the bill would be a good defence at law under the principles now prevailing in the latter jurisdiction. *Viele v. Hoag*.

## DISCHARGE OF SURETY.

## UNITED STATES v. SAMUEL AND JOHN L. HOWELL.

In the Circuit Court of the United States.

OCTOBER TERM, 1836.

[REPORTED, 4 WASHINGTON'S REPORTS, 620-623.]

*If the creditor, whether the United States or an individual, give time to the principal in a bond prior to the breach of the obligation, without the consent of the surety, the surety is discharged, and he may set up the defence at law. Aliter, if the time be given after the breach, for then the only remedy of the surety is in equity.*

*If the law prescribe the terms of a bond to be taken, and one be taken variant therefrom, it is void, so far at least as it is variant. But the officers of government may, without any law, take securities from the debtors to the public for what they may owe.*

THIS was an action of debt on a bond executed by the defendants. After reciting that certain bonds to the United States for the payment of duties had been executed by Reeve, Lewis & Co., and Joseph S. Lewis as their surety, payable on certain days, which are set forth, and that the United States (in some of the counts, and the secretary of the treasury in others), had agreed to extend the time of payment of said bonds for one year from the day of payment thereof respectively, the condition of the bond is, that the obligors in those bonds shall pay to the collector the amount thereof, on or before the expiration of the said periods of one year from those when the same had respectively become due according to the tenor of them, with interest. Breach, that the obligors in those bonds had not paid to the collector the amounts of said bonds, on or before the expiration of one year from the time they had respectively become due, &c.

Plea, that on such a day (after the year when the said bonds had become due), the plaintiffs promised and agreed with the surviving partner of Reeve, Lewis & Co., to postpone and defer the payment of, and all proceedings at law and claims to the payment of the said bonds, for a long time after the said respective terms of one year from the periods when the same respectively became

due, to wit, &c. And that in pursuance of said agreement, the plaintiffs did postpone the payment, and all claims and demands for the payment thereof, and did allow to the obligors in said bonds further time for payment of said bonds, beyond the said term of one year, &c.; which said agreement was made without the assent, concurrence, or participation of the defendants, for which cause they say they are discharged from any liability to the plaintiffs, &c. General demurrer and joinder.

In support of the demurrer, it was contended by the district attorney, that although a new contract between the creditor and the principal, by which the former binds himself to extend the time of payment, without the consent of the surety, will in general discharge him, yet that the surety, where he is bound by a sealed instrument, cannot plead this matter *at law*, and that none of the cases go to that extent. He cited the following cases: 6 Binn. 292; 1 Peter's C. C. R. 46; 9 Wheat. 736; 2 South. 584; 5 B. & A. 187; 1 Gall. 30; Shep. Touch. 382, 397; 3 Wills. 352; Cowp. 47; 7 Johns. 332; 2 Gall. 520; 17 Johns. 384; 2 Johns. C. C. 560; 3 Yeates, 157.

For the defendant, the following cases were cited: 9 Wheat. 703; 2 Brow. C. C. 578; 18 Ves. 20; 2 Ves. Jun. 530; 2 Johns. C. C. 557; 3 Bos. & Pul. 365; 2 Bos. & Pul. 62; 1 Bos. & Pul. 419; 8 East, 576; 3 Wills. 530; 10 Johns. Rep. 180; 2 Halst. 89; 3 Halst. 27; Ludlow v. Chaumond, 2 N. E. Cases in error, 29; 2 Cranch, 358, 380, 398; 2 Day, 236; 3 Johns. Rep. 369; 7 Johns. 339.

WASHINGTON, J. The main question in this case is, whether the indulgence granted to the surviving partner of Reeve, Lewis & Co. by the United States, by extending the time for the payment of their bonds, discharged the defendants, their sureties at law? The general principle established by all the cases is, that if the creditor, without the assent of the surety, expressly or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged. The principle of the decisions is that the surety guarantees the performance by his principal, of a particular contract, and engages for nothing more. If, without his consent, that contract be varied by the act of the creditor, the surety is not bound by the new contract; and by the act of the creditor, the old one cannot be enforced according to its term, without violating the new agree-

ment, which, although not binding on the surety, is so upon the parties to it.

But it is contended by the counsel for the plaintiff, that, since a bond cannot be discharged at law, but by something of equal dignity, it is no defence to an action upon the bond against the surety, that, by a parol agreement with the principal, without the assent of the surety, the creditor has bound himself to enlarge the time of payment stipulated in the bond; and in support of this argument, reliance is placed upon the case of *Davey and others v. Prendergrass*, 5 Barn & Ald. 187.

I entirely agree in the decision of that case, and in the application of the principle stated to it. The undertaking of the surety, if such he may be considered, was, that *he himself* would pay, within one month after demand, such balance, not exceeding £500, as upon the settlement of accounts between the plaintiffs and S. P. and J. P., should appear to be due from the latter to the former, for coals to be delivered by the plaintiff to those persons. As between the plaintiff and the defendant, the latter made himself the principal debtor; and it would, therefore, be difficult to state any legal principle upon which the defendant could be discharged on the ground of the parol agreement between the plaintiff and those who, it is possible, were, in relation to the defendant the principal debtors; although this was by no means obvious from the terms of the defendant's engagement. Indeed, the defence could not have been maintained at law, even if the parol agreement had been made with the defendant himself, upon the principles of the common law stated by the court.

If in this case, the court meant to lay it down as law, that a surety in a bond, conditioned for the payment of money, or the performance of certain acts, by a third person, cannot be discharged from his obligation except by some instrument of equal dignity, I must be permitted to dissent from such a doctrine, and to maintain that it is insupportable by a single authority. Will not performance, in pais, by the principal, discharge the surety? May not the surety, and may not even the principal, discharge himself by acts in pais, tending to excuse the non-performance, by showing it was occasioned by the conduct of the creditor? If this be so (and who can deny it?) where is the legal principle which shall prevent the surety from pleading as an excuse for the non-performance of his engagement, that the creditor interfered, and prevented the performance, by entering into a new contract

with the principal; by which the performance by him was dispensed with, and postponed to a period beyond that mentioned in the contract which the surety had guarantied? The question at law then is, whether the contract of the surety has, without his consent, been changed by the obligee? If it has, the obligee has, by his own act, defeated the condition of the surety's bond, and consequently discharged him from his obligation at law, as well as in equity. This leads to the inquiry, whether in the particular case in which the surety relies upon a discharge so brought about, the contract which he bound himself to guaranty, has been changed?

If that contract be to pay money, or to perform a particular act on a particular day; *before which* day, the time of payment or performance is enlarged by a parol agreement between the obligee and the principal, without the assent of the surety: I hold it that the surety is discharged; upon the ground that the terms of this contract are varied without his consent, by the act of the obligee. But if the new agreement be made *after the time for payment or performance has elapsed*, so that the bond of the surety has become forfeited, I do not perceive upon what *legal ground* it can be alleged, *that the contract of the surety has been varied by such subsequent agreement*. Such an agreement, I admit, deprives the surety of his *equitable* right to call upon the creditor to enforce payment or performance, and upon his refusal, to ask the aid of a court of chancery to compel the obligee to do so; and since the obligee has, by his subsequent agreement, disabled himself from proceeding against the principal; that court will, upon equitable principles, relieve the surety, and enjoin proceedings at law against him. These appear to me to be the principles which are fairly to be extracted from the numerous cases upon this subject. The difference between an extension of the time by the obligee *before and after* the bond is forfeited, is laid down by Lord Edon in the case of *Rees v. Berrington*, 2 Ves. Jun. 540, and is, I think, founded upon principles of law.

Upon the whole, I am of opinion, that since the new agreement with the principal debtors in this case was entered into after the time when their debts to the United States became due, such an agreement does not at law amount to a discharge of the defendants. Cro. El. 46.

It has been made a point whether this bond, not being required to be taken by any act of Congress, is a valid one?

My opinion upon this point is, that where a statute requires an official bond to be taken, and prescribes substantially the terms of it, it must conform to the requisitions of the statute, and if it go beyond them it is void, so far at least as it exceeds those requisitions. But I have no doubt that the officers of the government may legally take bonds, or other securities, for debts due to the United States, although no act of Congress authorizes their being taken in the particular case.

The opinion given upon these points renders it unnecessary to consider the question raised by the district attorney, whether the principles laid down in deciding the first point can be applied to the United States.

Judgment must be entered upon the demurrer for the United States.

*Elmer*, district attorney, for plaintiffs.

*Wood*, for defendants.

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THE BANK OF STEUBENVILLE v. LEAVITT AND  
JUDITH CARROL, ADMINISTRATORS OF ROBERT CARROL,  
DECEASED.

In the Supreme Court, Ohio.

DECEMBER, 1831.

[REPORTED, 5 HAMMOND, 207-215.]

*Every act or agreement by which the right of the creditor to proceed against the principal is delayed or suspended, is a discharge of the surety, and may be relied on as such, at law, as well as in equity.*

[\*THIS was an action of debt on a bond executed by the defendant's intestate, and conditioned for the payment of \$1450 to the plaintiffs. To this action the defendants pleaded, that the bond in question was made by the intestate as surety for one J. C., and not as principal; of which the plaintiffs had notice at the period when it was executed; and that afterwards they

\* The syllabus and statement of the reporter are omitted.

had accepted a confession of judgment from the principal for the amount of the debt for which the bond was given, with an agreement for stay of execution; by the terms of which the final collection of the debt was to be postponed for eighteen months. To this plea there was a general demurrer, upon which, after argument, the following opinion was delivered.]

BY THE COURT.

He who becomes surety for another, has a right to pay the debt, when it becomes due, and collect it from his principal; he may substitute himself in place of the creditor, and subject any funds or securities provided for the payment of the debt, by the principal; or he may call upon the creditor to prosecute his suit without delay. The law does not permit the creditor to interfere with these rights. If he do invade them, the surety is held to be discharged.

No principle is better settled, at the present day, than that a surety cannot be further bound than by the terms of his undertaking. These terms cannot be changed without his consent. If any change is made that might prejudice his rights without his consent he is protected by holding his obligation at an end. A simple omission on the part of the creditor to pursue this remedy, is not considered as affecting the rights of either party. But any act which destroys or suspends the rights to an instant and continuing pursuit of the remedy, so that the surety cannot enforce the collection of the debt without delay, absolves him from his liability.

The defence which such an act gives to the surety is one proper to be set up in a court of law. The doctrine is originally of chancery, and is of recent introduction there. Its adoption, in the courts of law, is almost within our own times (4 Cam. C. 336), and it prevails, in either court, according to the circumstances of the case. The authorities upon which it rests are very numerous. (7 John. 336; 12 John. 174; 17 John. 384; 2 Merivale, 276; 4 John. Ch. 7, 337; 2 Marsh. 82, 392; 2 Ves. Jun. 550; 4 Ves. 737; 1 Gal. 32; 1 Mass. 339; 1 Paine, 305; 3 Wash. C. C. 7; 4 Wash. C. C. 26; 2 Rand. 333; 12 Wheat. 556.)

In the case in 2 Rand. the court lay down the doctrine broadly: "If a creditor by agreement, with the principal debtor, or by any other act precludes himself at law, from proceeding against the principal after the debt is due, for a moment, or if the



agreement is such that a court of equity would stay proceedings at law, the surety is discharged." Here is a judgment with a stay of execution entered of record. This ties up the creditor's hands. If the surety were to pay the debt, he could do nothing with the judgment until the stay of execution expired. The consideration upon which the stay of execution was entered is not a matter for investigation. The fact that it is entered suspends the creditor's right to sue execution, until the entry is avoided. That it is sufficient to discharge the surety.

It is objected to the plea that it does not sufficiently aver that the stay of execution was entered without the consent of the surety. The want of this consent is the material fact of the whole defence. We therefore think that the plea is defective. But leave is given to amend.

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JOHN HARRIS *v.* ISAAC BROOKS, JR.

In the Supreme Court of Massachusetts.

OCTOBER TERM, 1838.

[REPORTED, 21 PICKERING, 195-197.]

*A declaration by the holder of a promissory note, that he will look solely to the principal for payment, in consequence of which the surety omits to obtain security for his indemnification, is a sufficient defence to an action on the note against him.*

*And parol evidence is admissible for the purpose of letting in such a defence, by showing that the relation between the two joint makers of the note, was that of principal and surety, and that this was known to the plaintiff at the time of making the declaration.*

[THIS was an action of assumpsit against the defendant Brooks, as one of the makers of a promissory note, which was as follows: "Boston, August 16th, 1832. For value received we promise to pay Abel Parker or order five hundred dollars in thirty days and grace, (signed) Reuben Damon, Isaac Brooks, Jr." The note was endorsed in blank by the payee, but did not

come into the hands of the plaintiff until overdue, and the defendant was therefore entitled to rely on the equities, which had previously attached to the instrument. It appeared from the evidence, that it had been drawn for the accommodation of the other maker, Damon, the defendant being merely a surety, and that after it became due he called upon the payee and said, that if he was to pay the note at all, he wished the matter attended to at once. To this the latter replied, that as Damon had received all the money on the note, and ought to pay it, the defendant need give himself no trouble about it, as he should not be injured.

The jury were thereupon instructed, that if the defendant was a surety at the time when this answer was given, and was known to be such by the payee, and in consequence of what was said by the latter, omitted to pay the note and secure himself out of the property of the principal, they ought to find a verdict against the plaintiff.

An exception having been taken to this instruction at the trial, the following opinion was delivered by SHAW, C. J.]

We are now to take it as found by the jury, under the instruction given them, that for several years after this note became due, Barnard was the endorsee and holder of it, that as between the two promisors, it was an accommodation note, that is, that the money raised upon it, was raised for the benefit of Damon and went to his use, that this was known to the holder, that after it became due, Brooks expressed a willingness to pay it, and if he was to pay at all, wished to pay it then, because he could then get security of Damon, and that the holder then verbally discharged him, and agreed to look to Damon alone, recognizing him as principal.

The court are of opinion, that the instruction was correct, and that upon these facts, the defendant was not liable.

It is very true that an agreement between two promisors of a note, that the one shall take the whole of the proceeds and pay the whole note when due, cannot affect the rights of the holder, unless he will take notice of it, and act upon it.

The presumption, that two or more promisors of a note are equally responsible for its ultimate payment, so that if one pays the whole he shall have contribution, may be rebutted by showing that one signed for the accommodation and as surety for the other. So in this case, if upon the facts now proved, Brooks had paid

the note, he would have had a remedy against Damon, not for contribution only, but for an entire reimbursement. So if Damon had paid it, he would have had no claim on the defendant for contribution. So, where one of two promisors annexes the word "principal" to his signature, and the other "surety," these descriptions do not affect the terms of legal effect of the contract, they are equally bound to the promisee or endorsee as if such words of description had not been annexed. They indicate the relation in which the parties stand to each other, and notice of such relation to the holder. But the fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption. It goes to show, that the defendant was in fact a surety; and the rights of contribution result accordingly. Had the parties appeared on the note, the one as principal, and the other as surety, a parol declaration of the holder to the surety, that he would exonerate him and look to the principal only, is a good defence, on the ground, that it lulls the party into security, and prevents him from obtaining his indemnity; and it would be fraud on the part of the holder, afterwards, contrary to such assurance, to call upon such surety. We think the same result follows where the fact is proved by other evidence. Here the assurance was given, after the note was due, by Barnard, who was the holder of the note, with full power of disposing of it. The present plaintiff, having taking the note by endorsement, long after it was due, took it as a dishonored note, and liable to any defence which could be made to it, had the suit been brought by Barnard.

Judgment on the verdict for the defendant.

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DAVID N. CARPENTER v. ZADOCK KING.

In the Supreme Court of Massachusetts.

SEPTEMBER TERM, 1845.

[REPORTED, 9 METCALF, 511-517.]

*It is a good defence to an action of debt on a judgment, against the survivor of two judgment debtors, to show that the defendant was a surety for the other debtor in the original obligation on which the*

*judgment was obtained ; and that he gave up a security which he held for the debt, on being told by the plaintiff that the judgment was paid. And this may be shown, even where the instrument on which the judgment is founded, was executed by both debtors jointly, without anything on its face to show that one was merely a surety for the other.*

*Such a defence is good even where there was no actual fraud, or intention to deceive, on the part of the creditor.*

The opinion of the court was delivered by

SHAW, C. J.\* There are several grounds, appearing in the bill of exceptions, upon which the court are of opinion that a new trial must be granted. But as both parties have requested the opinion of the court upon one aspect of the case, which we suppose embraces its true merits, and may be decisive, we have so considered it. We assume, then, that King, the defendant, entered into a contract, by promissory note, jointly, or jointly and severally, with Cyrus Alden, for the payment of the money to the plaintiff; that the note did not express that either was principal or surety; that in point of fact, if it is competent to prove it by evidence *aliunde*, King was surety for Alden, and that known to the plaintiff; that Alden gave the defendant security to indemnify him against such liability; that an action was brought and a joint judgment recovered against Alden and the defendant, which was satisfied in part only; that the plaintiff, not intending to deceive or defraud the defendant, informed him that the debt was paid in full, when in fact it was not so; after which, the defendant relinquished his security, Allen died insolvent, and this action was brought against the defendant, as survivor, to recover the balance of the judgment.

This case, we think, presents three questions: 1st. Whether it is competent, when two or more have signed an obligation for the payment of money jointly, or jointly and severally, for one to show, by evidence *aliunde*, that he was surety for the other. 2d. Whether, if such evidence were admissible in a suit on the original contract, that contract is merged and consolidated by the judgment, so that a new debt arises, in which all must be deemed principals, and so that, in an action of debt on the judgment, it is no longer competent to go into evidence *aliunde*, to show that the

\* The facts of the case sufficiently appear from the opinion of the court.

defendant was surety. 3d. Whether, if a creditor, without any intention to deceive or mislead a surety, informs him that the debt is paid by the principal, and the surety afterwards relinquishes his security, this is a good defence in a suit against the surety.

1. It appears to us very clear, that the fact may be proved by any competent evidence, that, in a contract executed by two, one was principal and one surety, and that it is not necessary that it should so appear by the contract. It is a fact collateral to the contract, and no part of it. It may appear in the body of the instrument, or the term "principal" may be annexed to the signature of the one, and "surety" to that of the other. In that case, the fact and notice of it accompany the note or obligation, into whose hands soever the note may come. Still it is a collateral fact, showing the relation in which the promisors stand to each other. *Baker v. Briggs*, 8 Pick. 122; *Harris v. Brooks*, 21 Pick. 195. In the last case, the point was directly decided. So, in order to ascertain the relation of the promisors to each other, with a view to a remedy, when one pays the whole, or more than an aliquot part. These remedies are not secured by the original contract, and form no part of it; they are given by law, and do not depend on the fact of their having united in signing the instrument. The instrument is resorted to for the purpose of showing that both were bound. Therefore, where parties were sureties on different bonds, for the same debt or duty, the law gave a remedy for contribution, in the manner as if they had united in signing the same bond. *Deering v. Earl of Winchelsea*, 2 Bos. & Pul. 270. So where two or more have signed a note, not designating either as principal or surety, *prima facie* both are principals, and if either pay the whole, he shall have contribution. But it may be always shown by evidence *alimunde*, as between themselves, that the note was made wholly for the accommodation of one, showing him to be the principal debtor. If he pay the whole, he has no contribution; if the other pay the whole, he shall have an action for money paid, for the whole amount. *Austin v. Boyd*, 24 Pick. 64.

2. Nor do we think that any change in this respect is made in the rights of the parties by the judgment. The proof offered does not contradict the judgment. The original cause of action, as between the parties, is merged by a judgment, because the judgment itself is a security of a higher nature. But when it becomes

necessary to inquire and ascertain on what contract a judgment was rendered, it may be done. *Wyman v. Mitchell*, 1 Cow. 316. There is the same reason for admitting evidence *aliunde*, to show the relations of parties who are joint debtors in a judgment, as in a contract. *Prima facie*, they are equally as well as jointly liable. Take the common case of a bond, where on the face of it one is principal and the other surety, yet the judgment is joint. By the record, apparently, both are principal debtors. If the grounds of the judgment could not be inquired into, so as to rebut the presumption of an equal liability, the surety, in case of paying the judgment, would have no remedy over against his principal for money paid; and in case the principal should pay it, he would have an action against his own surety for contribution. If it can be inquired into, to adjust the relations of the debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights. Suppose the creditor himself holds collateral security of the principal; it has been often decided that the surety is entitled to the benefit of it, and if the creditor voluntarily surrenders it, he discharges the surety wholly or pro tanto. *Hayes v. Ward*, 4 Johns. Ch. 123. Would not this principle apply as well after a joint judgment against the debtors as before? And yet it would involve the necessity of an inquiry into the judgment, to show that it was rendered on a contract in which one was principal and the other surety. The judgment is technically a security of a higher nature, but it is a security for the same debt or duty as the contract on which it is founded. *Davis v. Maynard*, 9 Mass. 242. So, if a judgment be rendered on several demands, for some of which a third party is liable, but not for all, the fact may be shown by evidence *aliunde*. *Stedman v. Eveleth*, 6 Met. 114.

3. In regard to the other point, we consider it well settled, by numerous authorities, that when a creditor, who knows that one debtor is a surety, gives him notice that the debt is paid by the principal, and such debtor, in consequence, changes his situation, as by surrendering security, or forbearing to obtain security when he might, or otherwise suffers loss by it, he is discharged. And although the debt has not been paid, and such notice was given by mistake, and without any fraudulent design, it is a mistake made at his own peril, and he shall rather bear the loss than throw it upon one who has been misled by it. *Baker v. Briggs*, 8 Pick. 122; *Harris v. Brooks*, 21 Pick. 195; *Greenl. on Ev.*

§§ 207, 212; *Dewey v. Field*, 4 Met. 381. In general, that which would afford a surety a remedy in equity against his creditor, by injunction, is a good defence at law, when suit is against the surety alone. *King v. Baldwin*, 2 Johns. Ch. 554, and 17 Johns. 384. A doubt was suggested in *Baker v. Briggs*, 8 Pick. 128, whether the surety could avail himself, in any form, of such matter of defence, in a joint suit against him and the principal; a doubt which has not been resolved, that we are aware of, by any subsequent judicial decision. Here the point does not arise, because the suit is against the surety alone, as survivor.

Verdict set aside, and a new trial granted.

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An examination of the preceding cases, will disclose that they do not entirely agree. In one of them, the defendant was referred for relief to the other side of the court on the technical ground, that the contract was not varied until after the default. In another, the discharge of the surety by time given to the principal, was treated as an established doctrine, which the law had derived from equity. In the third, it was said, that a defendant might always show that he was a surety, and that if he did, any matter that would afford ground for an injunction, would be a good defence in a court of law. It is proper to note the cause of this divergence between tribunals professing to administer the same system of jurisprudence.

DeLoime, observes in his work on the English Constitution, that the Court of Chancery, performs the office of an experimental legislature, by introducing doctrines which are subsequently diffused through the whole body of the law; and the course of English and American jurisprudence during the last two centuries, affords numerous instances of the truth of this remark. Rights which could only be vindicated by an injunction, or a decree for specific performance, came through the gradual transplantation of equitable principles, to be recognized and enforced in the ordinary methods of procedure. The recovery on a bond was limited to the loss arising from the breach of the condition, and payment might be made at any time before suit brought. *Husband v. Davis*, 10 C. B. 645. A mortgage ceased to be regarded as a conveyance, and was viewed as a security even after forfeiture. 1 Smith's Leading Cases, 811, 815, 6 Am. ed. Fraud or failure of consideration was allowed to be given in evidence as a defence to an action on a specialty; *Ib.* 635. The doctrine of equitable estoppel, was so enlarged as to embrace a great number of cases in which it had

been necessary to apply to equity to stay legal proceedings on the ground of constructive fraud; 2 Id. 762. The courts of law took cognizance of the right conferred by the assignment of a chose in action, and held, that it could not be defeated by payment, or a release with notice (ante, 356). *Welch v. Manderille*, 1 Wheaton, 233; *Westoby v. Day*, 2 E. & Bl. 605, 2 Leading Cases in Equity, part 2, 376, 3 Am. ed. A remedy was given by an action on the case for the loss arising from a false representation, as to the solvency of a third person. *Evans v. Bicknell*, 6 Vesey, 173, 183. Other instances of the assumption of equitable jurisdiction at law, may be found in *Toulmin v. Price*, 5 Vesey, 235; and *Kemp v. Pryor*, 7 Id. 327. The change was sometimes made legislatively by statute, as in the case of the penalty of a bond, but generally resulted from the tacit adoption of equitable principles by the courts of law.

This divorce of the doctrines of chancery from its practice, was deprecated by Lord Eldon, who denied that equity could be well or safely administered by the courts of common law. *Toulmin v. Price*, 5 Vesey, 235; *Evans v. Bicknell*, 6 Id. 173; *Kemp v. Pryor*, 7 Id. 327. The benefit has, however, far outweighed the evil. The former method tended to produce a failure of justice, which was not always compensated by sending the party for relief to another tribunal.

"Our system of jurisprudence," said Spencer, C. J., in *King v. Baldwin*, "is in a constant process of improvement, and some of the most valuable principles, have attained their perfection within the recollection of many members of the bar. Many instances might be mentioned, but I will only refer to that just and salutary rule, that a court of law will take notice of, and protect the rights of an assignee of a chose in action. I have witnessed the rise, progress and establishment of that wholesome and equitable principle. This, too, was borrowed from a court of equity" (ante, 377). See *Westoby v. Day*, 2 E. & Bl. 605, 824.

The relation of suretyship presents a striking instance of the extent to which the doctrines of one system have been appropriated by the other. *Baker v. Briggs*, 8 Pick. 122, 129 (ante, 424); *Viele v. Hoag*, 24 Vermont, 46, 51; *Kemp v. Pryor*, 7 Vesey, 249; *Eyre v. Everett*, 2 Russell, 581; *Mayhew v. Cricket*, 2 Swanston, 185, 189. The doctrine was derived originally from the civil law (ante, 398); *Baker v. Briggs*, 8 Pick. 122, 129, but is due in its present form to the advocates and judges who have through the labors of successive generations raised equity to a height that has not been attained by any other system of jurisprudence.

The contract of the surety may be in the nature of a guaranty, or bind him to a direct performance; it may be parol or under seal; the alleged agreement for time, may have been before, or after the right of suit accrued. The legal effect of an unauthorized variation of the



contract with the principal, varies in each of these cases with the circumstances; but the equitable result, depends on a general principle, and is the same in all. A dispensation with the fulfilment of a contract after breach, is not a defence technically, even as between the parties (ante, 282). It could not, therefore, be set up by a third person, who was liable as a surety or guarantor (ante, 422). A gift of time before breach, might exonerate a guarantor, by substituting other terms for those to which he had agreed, but did not discharge a contractor who had bound himself to a direct performance without sharing in the benefit of the consideration. *Shaw v. McFarlane*, 1 Iredell, 216. Such at least, was the rule at law, but a different view prevailed in equity. Payment by the surety, was there viewed as a purchase, entitling him to all the remedies and securities for the debt. This right of subrogation was regarded as one of the utmost value, and if the creditor impaired it by postponing the fulfilment of the contract, or in any other material particular, the surety was equitably discharged. *Hodgson v. Shaw*, 3 M. & K. 190 (ante, 409). It made no difference in this aspect of the question, that the gift of time was by parol or before the breach, because it was in either case a conclusive answer to a bill praying that the contract might be punctually fulfilled, and the most formal release could be no more. The equity was, moreover, independent of the terms of the instrument, and a co-contractor or co-obligor, might claim it as readily as if he were professedly a guarantor. *Rees v. Berrington*, 2 Vesey, Jr. 540. These principles are now adopted by the courts of law. But the change was gradual, and it long remained uncertain whether a surety could plead that he was such, when it did not appear on the face of the writing, or take advantage of a variation of the contract which was not a legal bar. In *The United States v. Howell* (ante, 422) the surety averred, that after the bond of the principal became due, the plaintiffs agreed to extend the term of payment, and Washington, J., said, that if such an agreement had been made before breach, it would have been a good defence by way of waiver, but that it formed no justification for the default which had previously occurred. The surety had been deprived of his equitable right to require immediate payment, and might obtain relief by filing a bill in equity, but the plea was insufficient in a court of law. It is now, seemingly, established in the courts of the United States, as well as in those of the several States, that an injury to the right of subrogation, is a good legal defence whether the agreement out of which it arises is made before, or after the breach; but the case of *The United States v. Howell*, may still be consulted with advantage as denoting the original boundaries of legal and equitable jurisdiction, and the extent to which one system has been enlarged by principles drawn from the other. It also indicates the existence of a class of cases, in which an

alteration of the contract with the principal will discharge the guarantor on merely legal grounds without a resort to equity.

The doctrine has sometimes been stated as co-extensive in both jurisdictions, and depending on the same principles. It is, however, obvious, that to render a gift of time to one man a discharge of another, it must vary the obligation into which he has entered. If A. promises that B. shall pay on request, or at a day certain, an agreement with B. to extend the time will release A., who is neither responsible for the breach of the original contract, nor bound by the new one (ante, 420). When, however, the promise of A. is that he will pay, and not that payment shall be made by B., an agreement with B. for time will not legally discharge A. merely because he is a surety and B. the principal. *Shaw v. McFarlane*, 1 Iredell, 216. Under these circumstances, the injury is to the collateral obligation of the principal to indemnify the surety, and does not touch the obligation of the surety to the creditor. It is proposed in this note, to consider when an alteration of the contract with the principal will be a legal discharge of the surety, and then to state the more general rule which prevails in equity.

To give a right to judgment on a contract, it must appear that the plaintiff has performed all the conditions precedent on his part, and that a default has taken place on the part of the defendant by the non-fulfilment of some stipulation made by him. These are the essentials to every cause of action, *ex-contractu*, whether the suit is against a principal or a surety. *Jones v. Kerr*, 30 Georgia, 93. The rule applies with peculiar force to a guaranty, where the consideration moves to the principal and the guarantor is only bound by the letter of the contract. In *Whitcher v. Hall*, 5 B. & C. 269, the declaration averred, that by certain articles of agreement between the plaintiff of the one part, and one Joseph Hall and the defendant of the other part, the plaintiff agreed to let, and Joseph Hall agreed to take the milking of thirty cows for the sum of £7 10s. per cow, per annum, and the defendant thereby agreed to pay or cause to be paid the said rent at the days and times whereon the same was reserved. It was subsequently agreed between the plaintiff and Joseph Hall, that more cows should be sent in the spring, and fewer in the fall, and the number which had been increased in May to 32, was accordingly reduced in October to 27. Under these circumstances, the court held that as the plaintiff's promise was a condition precedent and had not been fulfilled, the defendant was not liable for the subsequently accruing rent. The agreement was not to pay so much for each cow, but a sum certain for the whole number, and was not binding unless all were furnished. This was obviously a mere application of the rule, that when the consideration is entire, it must be fulfilled in every part. *Cutter v. Powel*, 6

Term, 320. The defendant was discharged not because he was a guarantor, but because the plaintiff did not perform the contract. This would have been equally true so far as the letter of the agreement was concerned, whether the defendant was a principal or surety; although the receipt of the consideration in a modified form by the principal contractor, would have operated as a waiver, or given rise to a new implied promise to pay what it was reasonably worth. 2 Smith's Ldg. Cases, 47, 6 Am. ed.

It is in like manner essential to a recovery on a letter of credit or other agreement, to be answerable for the re-payment of advances to a third person, that the authority which it confers should be exactly followed on all material points. *Dobbin v. Bradley*, 17 Wend. 422; *Birckhead v. Brown*, 5 Hill, 634; *Walrath v. Thompson*, 6 Id. 540; 2 Comstock, 185. It is not necessary to show that the guarantor was prejudiced by the omission; it is enough that the terms on which the credit was given, have not been observed. A guaranty of paper payable at a particular bank, will not cover a note payable generally, and deposited in that bank before maturity. *Dobbin v. Bradley*. A draft for 90 days is not a good execution of a letter guaranteeing an advance to be negotiated by drafts at 60 days, although the change is not proved to be injurious, and is presumably beneficial as giving a longer credit. *Birckhead v. Brown*. The effect of an undue acceleration of the time of payment, will be the same as that of its postponement; (See *Bowser v. Cox*, 36 Beavan, 110, 118;) and a recovery was denied in *Walrath v. Thompson*, because the note taken for the price was made payable on the 23d of December, while the guaranty was of a sale on a credit to expire on the 1st of January. The defence in such cases rests on the two-fold ground that the plaintiff has not fulfilled the contract on his part, and that the breach is not one for which the guarantor agreed to be responsible (ante, 355).

To make the breach of one contract or promise a defence to a suit on another contained in the same instrument, they must, however, be dependent, and when they are not, the defendant will be put to a cross-action, and cannot rely on the plaintiff's default as a justification. *Campbell v. Jones*, 6 Term, 570; 1 William's Saunders, 320; 2 Id. 352; 2 Smith's Ldg. Cases, 25, 6 Am. ed. As the plaintiff may recover without an averment of performance, an unauthorized variation releasing him from the obligation to perform will not be a defence.

The failure of the creditor to carry out the provisions of the contract in every material particular, or his departure from them in any point that can affect the surety, will, however, discharge the latter in equity, even when it works no change in the legal relations of the parties, and would not be a defence at law. *Calvert v. The London Dock Co.*, 2 Keene, 638; *Jones v. Kerr*, 30 Georgia, 93; *Watts v. Shuttleworth*, 5

H. & N. 235 (ante, 399); *Bowser v. Cox*, 6 Beavan, 110, 118. The question is not, under these circumstances, whether the stipulation which has been violated is precedent or subsequent, but whether the position of the surety has been varied for the worse by the act of the creditor. Accordingly, where a loan which was to have been effected through a draft at three months was made in cash, the surety was held to be discharged. *Bowser v. Cox*.

It is also obvious that the plaintiff cannot recover in an action *ex contractu* without showing a breach of the agreement on which he sues. It is not enough that the principal has failed to keep his promise, unless he has also broken that made on his behalf by the guarantor. It will therefore be a defence to prove that the stipulated performance was dispensed with by a new agreement, to which the guarantor was a stranger. *The U. S. v. Tillottson*, 1 Paine, 363. Under these circumstances, the latter is not liable on the original contract which has been waived, nor on that which has been substituted for it without his consent. In other words, any act on the part of the creditor which prevents or excuses the fulfilment of the contract by the principal, will discharge the guarantor (ante, 421). *Coombe v. Wolf*, 8 Bing. 156; *Howell v. Jones*, 1 C. M. & R. 97; *Miller v. Stewart*, 4 W. C. C. R. 7, 26; 6 Wheaton, 680. It is accordingly a good plea to a bond conditioned that a third person or one of the obligors shall account for and pay over all moneys collected in the course of his office, that he did so account, and that the creditor took a bond payable at a future day instead of cash. *The U. S. v. Hillegas*, 3 W. C. C. R. 70. This results from the well established principle that a plaintiff cannot recover damages for a default which he has caused or sanctioned (ante). It is therefore independent of the peculiar grounds on which equity discharges a surety, and would be a good defence if the obligor was a principal contracting in his own behalf. *Hargreaves v. Parsons*, 13 M. & W. 564. Such a plea may, however, be sustained on either doctrine, and the courts have not unfrequently preferred to rely on the injury done to the right of subrogation, instead of the more limited and technical rule of the common law.

In this instance the bond was a new and valuable consideration, operating as a merger or satisfaction of the debt; and an executory agreement to postpone the period of payment or performance, is governed by different principles, and will not necessarily be a defence either to the principal or surety. It is well established in England, that a parol agreement to vary a contract under seal is not valid, even when it has been acted upon by the parties, and cannot be recalled without injustice. In *West v. Blakeway*, 2 M. & G. 729, the tenant was accordingly held liable for the removal of a greenhouse, by an assignee of the term, contrary to the covenants in the lease, although the

removal was effected in pursuance of a written authority from the lessor. It was said to be clear that the defence would not have availed the assignee, and the lessee was not in a better position. Prevention was an excuse for non-performance, but a license did not amount to prevention. The lessee had been authorized to disregard the covenant, not hindered from keeping it. In *Davis v. Pendergrass*, 5 B. & Ald. 187, the surety was, for a like reason, held not to be discharged by a parol agreement to vary the condition of the bond. A similar decision in *Bulleel v. Jerrold*, 8 Price, 467, was affirmed in the Exchequer Chamber, and again on error in the House of Lords; and the principle has been applied in several instances in the United States. *Steptoe v. Haney*, 7 Leigh, 501; *Tate v. Wymond*, 7 Blackford, 240; *Yates v. Donaldson*, 5 Maryland, 389; *Devers v. Ross*, 10 Grattan, 252.

It has also been held that, although an executory agreement may be altered at any time before breach, by mutual consent, this ceases to be true when the contract is executed by the passage of a consideration. An executory agreement to suspend an antecedent debt, or to accept goods in payment, is not a defence at law as between the parties, and cannot therefore be set up by a third person, who has made himself liable as surety or guarantor. 1 Smith's Leading Cases, 556, 574, 6 Am. ed.; *Foster v. Dawber*, 6 Exchequer, 839; *Graham v. Gibson*, 4 Id. 768 (ante, 267).

The rule that consent is incompatible with injury, is, however, one of general application in the United States. A covenant cannot be discharged by a contract of less dignity, but an agreement that the performance shall take place in a different manner, or at a different time and place may, notwithstanding, operate as a dispensation or waiver, holding good until it is recalled (ante). Post notes to *Prince v. Case*, 1 Smith's Leading Cases, 576, 6 Am. ed.; *Fleming v. Gilbert*, 3 Johnson, 528; *Pierrepoint v. Barnard*, 5 Barb. 364; 2 Selden, 279.

In *Niblo v. Clark*, 4 Wendell, 24; 6 Id. 236, a license to the principal to leave the State, was accordingly held to be a defence to an action upon a recognizance of bail, although the court relied on the fraud upon the surety, rather than the parol waiver of the breach.

It is, however, established, that a parol dispensation with the performance of a sealed contract will not discharge the surety, either at law or equity, unless sustained by a consideration, or the situation of the parties has undergone a change. Not at law, because a contract cannot be legally varied by one of less dignity; not in equity, because equity follows the law when there is no sufficient reason to the contrary. It is not, therefore, a good defence to a bond conditioned for the payment of a debt by a third person, that he was ready and willing when

the day arrived, but that the obligee forgave the debt, or agreed to wait for payment. Such a waiver is essentially revocable, and leaves the obligation as it was before. The plea in *The United States v. Howell* (ante), would have been insufficient on these grounds, even if the agreement to give time for the payment of the bond had been made before the breach. In *Locke v. The United States*, 3 Mason, 446, the action was brought on a joint and several bond, conditioned that one of the obligors should once in three months, well and faithfully account for and pay over to the postmaster-general, all moneys received in the discharge of his office as postmaster; and the defendants below, pleaded that an order had been made on behalf of the obligee, directing such moneys to be retained until drawn for, by which means the payment stipulated for in the bond, was prevented until after the removal of the party by whom it was to be made, from his official position. The defence was held invalid both at law and in equity, on the ground that a parol waiver, cannot vary the obligation of a specialty in the former jurisdiction, and that no agreement for time can discharge the surety in the latter, unless it is sustained by a sufficient consideration to render it binding as a defence or cause of action. This conclusion is at variance with the opinion expressed by Washington, J. (ante,) that a dispensation, with an obligation under seal, before breach, is a good answer to an action against the obligor, and will therefore exonerate those who have guarantied its fulfilment.

In *Leavell v. Savage*, 16 Maine, 72, the court cited and approved this dictum, but said that the parol extension of the time fixed for the performance of the covenant, was determinable at any moment, and therefore did not discharge the defendant, who had executed a bond as guarantor; and such is unquestionably the general current of authority, both in the United States and England. *Tate v. Wymond*, 7 Blackford, 240; *Steptoe v. Haney*, 7 Leigh, 501. Whether a delay prolonged under an express authorization of the creditor, until the principal became insolvent would exonerate the guarantor, is, perhaps, a doubtful question. But the authorities, as a whole, would seem to indicate, that although a license is revocable when originally given, it ceases to be so when acted upon, and will then be a good answer to a claim of damages for the default. *Fleming v. Gilbert*, 3 Johnson, 528; *Laugworthy v. Smith*, 2 Wend. 587; *Pierepont v. Barnard*, 5 Barb. 364; 2 Selden, 279; post notes to *Rerick v. Kern*.

Whatever the rule may be on this point, it is well settled that prevention is so far equivalent to performance, that if the plaintiff does any act by which the fulfilment of the contract is impeded, it will be a justification for the breach. The entry of the lessor for condition broken, will consequently excuse a subsequent failure to perform the covenants in the lease, and as this is true as it regards the tenant, it

will be equally so on behalf of a defendant who is sued as a guarantor. *The Trustees v. Miller*, 3 Ohio, 261. In like manner the acceptance by a bank of a new charter will discharge a prior guaranty of the good conduct of its officers. *The Bank of Washington v. Barrington*, 2 Penna. 27. It was said that the plaintiffs were not the body corporate with whom the defendant had contracted, and that his liability was at an end.

It will make no difference in the application of this doctrine that the alteration of the contract is only partial, or that the principal is still under an obligation which, though varied in some material particulars, is in other respects the same. *The Boston Hat Co. v. Messenger*, 2 Pick. 223. The answer is that the contract to which the surety agreed, no longer exists as a whole, and that he is not bound by that which has been put in its place. If, said Washington, Justice, the contract be varied by the act of the creditor, the surety is not bound by the new contract, and the old one cannot be enforced according to its terms without violating the new agreement which, although not binding on the surety, is so upon the parties to it (ante, 420). Hence a bond conditioned for the faithful performance of an agency or trust will be discharged if the duties of the principal are varied by the substitution of others of a different kind, although relating to the same subject matter. *The Boston Hat Manufacturing Co. v. Messenger*, 2 Pick. 223; *Goss v. Stinson*, 3 Story, 452. In the latter case the conversion of an agent into a conditional purchaser of the land which he had been employed to sell, was held to exonerate his sureties, on the obvious ground that the breach did not fall within the condition of the bond. He had been discharged by the act of the obligee from responsibility as an agent, and the defendants were not liable for his default in the capacity of a purchaser.

In *The Boston Hat Co. v. Messenger*, suit was brought against Messenger and others on a bond conditioned that he should well and faithfully discharge his duties as agent for the Boston Manufacturing Co., and account to and with the board of directors for all sums of money received by him in that capacity, and pay the same over when thereto requested. Parker, Ch. J., said that the bond did not define the character of the agency to which Messenger had been appointed, or state what duties he was to fulfil. It was, therefore, necessary to go outside of the writing to ascertain the nature and duration of the liability of the obligors, for it could not be pretended that they would be answerable for transactions falling without the scope of his employment as then understood. It appeared from the evidence that Messenger had, originally, charge of a store belonging to the plaintiffs, and that his duty was to deliver the hats which they manufactured as directed, and sell those which were not delivered at a commission, he guaranteeing

all sales by retail. This course of business was subsequently varied by a new arrangement, under which Messenger opened a store in his own name, with an agreement that he should be allowed to take as many hats from the plaintiffs as he required at wholesale prices, and retail them on his own account, and to account for the residue to the plaintiffs. It was obvious that this varied the risk for which the bond was conditioned, and thereby discharged the obligors. As the case originally stood, the sureties could incur no loss, but from a want of honesty in the principal, they were now exposed to all the hazards incident to trade, including loss by fire, bad debts, the rise and fall of the market, besides the danger that the rent and other expenses of the store would eat up the profits. They were consequently discharged on well established principles, both in equity and at law. The whole argument in this case might seemingly have been summed up in the proposition that a guaranty of an agency will not cover a sale, and that there was consequently no breach of the condition of the bond; but the cases where the plaintiff fails on legal grounds, and those where the defendant is discharged in equity, run so near together that they cannot readily be distinguished, and the courts have preferred to rely on the latter doctrine as broader and more easily applied.

It may be observed in further illustration of the principle, that while an executory agreement may discharge the surety in equity, by precluding the right to enforce the contract as originally made, it must be carried into execution to operate as a defence at law. A plea that the plaintiff had not furnished the stipulated number of cows would for instance, have been good in *Whitcher v. Hall* (ante, 434), without averring that he acted under a new and substituted contract. On the other hand, the new contract was not a legal defence, until it led to the failure of a condition precedent to the right of suit. To make a variation of the contract with the principal a defence on legal grounds, it must moreover occur before the breach for which the plaintiff sues. A dispensation with the performance of an agreement comes too late after it has been broken. Such a waiver may deprive the surety of the right to require the fulfilment of the contract by the principal, but it is not strictly speaking a defence at the common law. This was the turning point of the decision in the case of the *United States v. Howell*, which is clearly sound, if considered technically and apart from equitable grounds.

It is also obvious that an agreement to give time to the principal will not discharge a surety who is bound to a direct performance. *Waters v. Simpson*, 2 Gilman, 576. The law was so held in *Strong v. Foster*, 17 C. B. 201, which if erroneous, from an equitable point of view may be regarded as a correct exposition of legal principles. To render such a defence technically available, the surety must be a



guarantor and not a co-obligor, or contractor. See *Pooley v. Harradine*, 7 E. & Bl. 431. If A. promises that B. shall pay, B. cannot be released without discharging A., but a release of B. will not discharge a promise by A. to pay in person.

In this, however, as in other cases, equity has regard to the substance of the transaction. If a promise be made for the benefit of another, without sharing in the consideration, the promisor will be a surety, whatever may be the form of the agreement. *Hollier v. Eyre*, 9 Cl. & F. 1. The obligation of the surety may be indirect that another shall perform, or direct that he will perform himself, he may be jointly bound or appear on the face of the writing as the sole debtor, without his being on that account less a surety, or losing the equitable rights which belong to him in that capacity; *Davis v. Stearnbank*, 6 DeG. M. & G. 679; *Pooley v. Harradine*, 7 E. & Bl. 431; *Flynn v. Mudd*, 27 Illinois, 323; *Kennedy v. Evans*, 31 Id. 258; *The Grafton Bank v. Kent*, 4 New Hampshire, 221; These are to enforce the payment of the debt when due, and for that purpose to be subrogated to all the rights and securities of the creditor. *Wooldridge v. Norris*, 6 L. R. Equity Cases, 412; *Rees v. Berrington*, 2 Vesey, 541; *Bellows v. Lovell*, 5 Pick. 507; *Rawlaugh v. Hayes*, 1 Vernon, 190; *Moore v. Buckley*, 8 Wend. 194 (ante). If the creditor is not bound to use these himself, he is under an obligation to keep them intact for the benefit of the surety, and to place them at the disposal of the latter when required (ante). *Hollier v. Eyre*, 9 Cl. & F. 1, 45. This equity is independent of the form of the agreement between the surety and creditor, and depends on the relation between the surety and the principal. It may therefore exist whether the contract is a speciality or by parol, and arise from an agreement for time made after the happening of the breach. *Chew v. Brooks*, 5 Cushing, 43; *Samuel v. Howarth*, 3 Merivale, 272.

It was, indeed, generally held at one period, that an obligor was estopped from showing that he was a surety when it did not appear on the face of the instrument, and must consequently seek relief in equity. *Rees v. Berrington*, 2 Vesey 541; *Ashbee v. Pidduck*, 1 M. & W. 568; *Deberry v. Adams*, 9 Yerger 52; *Dozier v. Lee*, 7 Humphreys, 520. In *Ashbee v. Pidduck* a plea to a suit brought against one of the obligors in a joint bond, that the administrator of the other had been released before action brought, was held insufficient on this ground, notwithstanding an averment that the latter was the principal debtor, and that the defendant executed the instrument without consideration and merely as a surety. Lord Abinger said that such a plea could not be received to vary the writing, although the case would have been different if the bond had disclosed the true nature of the obligation. It seems to have been thought in like manner in *Price v. Edwards*, 10 B. & C. 578, that

one of the makers of a joint and several promissory note, could not open the way to a defence on the ground of time given to the principal, by showing that he was a surety. And when the question arose subsequently in *Strong v. Foster*, 17 C. B. 201, the court held that the admission of such evidence would be contrary to the rule that the meaning of a written contract cannot be varied by parol. The same point was decided in *Bull v. Allen*, 19 Cowen, 1011, and may be found, though less distinctly, in *Manly v. Boycott*, 2 Ellis & Bl. 46, and *Smith v. James*, Ib. 47. The court said in *Manly v. Boycott*, with an inconsistency for which it is not easy to account, that although the defendant could not allege that he was a surety, he might show that the plaintiff had agreed to treat him as such, at the time of taking the note, thus sanctioning a violation of the rule which they were assuming to enforce. These decisions seem to be based upon an erroneous view of the grounds on which such proof is received in equity, or inadmissible at law. The rules of evidence are the same in both jurisdictions, and a person who agrees to pay or perform in person, cannot prove that he is merely a guarantor. But although a defence cannot be set up contrary to the terms of the agreement on which suit is brought, there is nothing to prevent a party from showing that he agreed to be bound at the request of a co-obligor or contractor, who received and enjoyed the whole benefit of the consideration. Such evidence leaves the contract exactly what it was before, and simply establishes the existence of a collateral obligation. *Flynn v. Mudd*, 27 Illinois, 323; *Kennedy v. Evans*, 31 Id. 258; *Pooley v. Harradine*, 7 E. & Bl. 431. It is on this ground that an accommodation maker or acceptor maintains an action for money paid, laid out and expended against the party at whose instance the instrument was made and negotiated. But although evidence that one of the makers of a note is a surety and that time was given to the other, is not repugnant to the contract, it does not follow that it is technically available in a court of law, and the defence which it discloses seems to be one of those constructive frauds which are only cognizable in chancery. *Hollier v. Eyre*, 9 Cl. & F. 11.

The authorities proceed on two different grounds, which have not always been distinguished with sufficient accuracy. One of these assumes that even when the surety binds himself directly, his engagement is, in fact, collateral. Every surety is, agreeably to this view, to be regarded a guarantor when the question is, whether he is discharged, although it is admitted that he may be charged according to the terms of the agreement without alleging that the principal is in default. *Law v. The East India Co.*, 4 Vesey, 824.

In *Rees v. Berrington*, 2 Vesey, Jr. 540, 2 Leading Cases in Equity, 529, 3 Am. ed., Lord Loughborough said that it was the form of the security which forced the surety into equity. When a bond was con-

ditioned in terms for the debt of another, payable at a given day, if the obligee defeated the condition of the bond, he discharged the obligor. When, however, the parties were bound jointly and severally, the surety could not aver in pleading that he was bound as surety, although if that could be established at law it would appear that he had an interest in the punctual fulfilment of the condition, and if time was given the condition would be gone and the liability of the surety at an end. The principle was a legal principle, although where the contract of the surety was direct, it could only be applied in equity. Subsequently, in *Stone v. Compton*, 5 Bing. N. C. 142, a misrepresentation with regard to the state of the accounts between the creditor and principal, was held to exonerate the surety from liability on a note given to secure the debt. There can be no doubt of the soundness of this decision under the rule laid down in *Pasley v. Freeman*, 3 Term, 51, that fraud is not less actionable because the injury which it inflicts is indirect. But C. J. Tindal said, in delivering judgment, that he could "see no good legal distinction arising from the form of the security itself; that is, whether such security was taken in the form of a promissory note, or as an ordinary guaranty for the payment of the debt of a third person. For the liability of the maker of the note, and of the guarantor, depend precisely upon the same event, namely, the default of the principal debtor to make good his payment; and the extent of the surety's liability is precisely the same on either instrument; so that there seems no reason, and no authority has been cited, to the effect that the validity of the two instruments should not stand upon precisely the same footing, so far as it depends on the circumstances under which they were given."

Agreeably to this view, a gift of time to the principal or a variation of the contracts, in any other particular, may dispense with the performance for which the surety has stipulated, even when his obligation is immediate. It is, however, open to the grave objection of interpreting a direct and primary engagement as collateral. A promise to perform in person cannot be interpreted as a promise that another shall perform without bending the language of the parties to their supposed intention. In this aspect of the question, it is not surprising that the Court of Common Pleas should, in *Strong v. Foster*, have refused permission to a joint promissor to show that he was a surety. It is therefore preferable to put the exoneration of the surety on the obstacle interposed by the variation of the contract to the successful assertion of his equity against the principal. Such a defence leaves the contract with the creditor untouched, and rests exclusively upon the injury to the right of subrogation (ante, 409). *The Bank v. Hoge*, 6 Hammond, 17; *Flynn v. Mudd*, 27 Illinois, 323; *Kennedy v. Evans*, 31 Id. 258. It does not therefore conflict with the doctrine of estoppel, or the rule which

forbids the variation of a written contract by parol evidence. Accordingly, in *Bell v. Banks*, 3 M. & G. 258, Tindal, C. J., deduced the discharge of the surety from the constructive fraud on the relation between him and the creditor, which is independent of the form of the contract with the principal, and may be shown whether that is collateral or immediate. An allegation that one of several joint obligors or contractors is a surety, is therefore not contrary to the rules of evidence, and does not tend to contradict the contract. *The F. & M. Bank v. Rathbone*, 26 Vermont, 19, 34; *Jones v. Jeffries*, 17 Missouri, 597. It is directed to establishing, not that the defendant is a guarantor, but the existence of an equity which arises whenever a man binds himself, at the request of another without consideration. The question arose in *The Bank of Steubenville v. Hoge*, 6 Hammond, 17, on a demurrer to a plea that one of the defendants in a suit upon a joint and several bond, was a surety, and that the plaintiffs had, with notice of the fact, given time to the principal. The following reasons were assigned in overruling the demurrer :

“The other point now submitted for decision is, whether the obligor is estopped by his bond from showing his relations as surety, except where the face of the instrument affords evidence of the fact. The doctrine of estoppel proceeds upon the ground that an obligor is concluded at law, by his own admissions, under his own seal, in the instrument against which the objection is alleged. But there is no attempt here to deny the obligation of this paper, or to evade its admissions. Nothing appears on its face inconsistent with the suretyship of the defendants. The defence sets up a distinct and independent fact, beyond the terms of the writing, not controverting any of its stipulations. If the obligation recited that the obligors were principals, there might be color for the assumption that the admission concludes them. In the absence of such recital, we find nothing to stop them from proving the truth.”

In *Dickinson v. The Board of Commissioners*, 6 Indiana, 128, a plea that time had been given to the principal was, in like manner, said to be good, even when the contract is under seal, and contains nothing to show that the defendant is a surety; while in *Archer v. Douglass*, 5 Denio, 307, the defendants were permitted to show that the bond which they had given to indemnify the sheriff was executed on behalf of a third person, who was the principal in the transaction, and thus let in a defence founded on a release to him.

The principle applies *a fortiori* when the contract is by parol. In *The Branch Bank v. James*, 9 Alabama, 949, extrinsic evidence was admitted that one of the defendants in a suit on a promissory note, was in fact a surety, and had been discharged by time given to the principal. The same point has been decided in numerous instances. *Grant v.*

*Ferguson*, 9 Missouri, 123; *The Bank v. Abbott*, 28 Maine, 280, 34 Id. 547; *Mudd v. Flynn*, 27 Illinois, 323; *Kennedy v. Evans*, 31 Id. 258; *The Grafton Bank v. Kent*, 4 New Hampshire, 221. In *The Grafton Bank v. Kent*, Richardson, C. J., said, "that when the maker of a note, who has signed as a surety, does not appear on the face of the paper to be a surety, he is to be considered and treated as a principal with respect to all those who have no notice of his real character, but that wherever it is material, a defendant may show by extrinsic evidence, that he made the note as a surety only, and that it was known to the plaintiff that he was only a surety." It is established under these decisions, that evidence that one of the parties to a joint, or joint and several written contract is a surety, does not contradict the writing, and will not be precluded by it. *Jones v. Jeffries*, 17 Missouri, 597; *The Farmers' & Mechanics' Bank v. Rathbone*, 26 Vermont, 19, 34.

A similar view was taken in *Pooley v. Harradine*, 7 E. & Bl. 431; approved in *Greenough v. McClelland*, 2 E. & E. 424, and overruling *Strong v. Foster*, 17 C. B. 201. Coleridge, J., said, in delivering judgment, that if the discharge of the surety could only be effected by establishing that there was a different contract from that apparent in the writing, as for instance, that he was to be liable not primarily, but collaterally only on default of the principal, the defence would be inadmissible. Lord Cottenham had declared in *Hollier v. Eyre*, 9 Cl. & F. 145, that the question whether the complainant was a principal in the grant of the annuity, or only a surety for the payment of it by another, must be determined as between himself and the grantee by the terms of the instrument itself. But although all the grantors were principals as to the grantees, yet as between themselves, some of them might be sureties, and if it was established, that such was the case as between the complainant and Lynch, and that the grantees knew it, they might by their dealing with Lynch, raise an equity in favor of the complainant. The rule as laid down by Lord Cottenham, therefore, was that such an equity might arise dehors the written agreement from the relation of principal and surety *inter se* if known to the creditor, and that his knowledge might be proved either from what appeared on the face of the instrument or *aliunde*. It had been determined in like manner in *Davis v. Stainbank*, 6 De G. M. & G. 679, that the complainant who had accepted a bill of exchange for the accommodation of his nephew, to secure a floating balance due from him to the respondent, was discharged by time given to the principal, because the necessary consequence of such an act, was to protect the latter for a period of more or less duration against a demand either by the creditor or surety. It was a fraud in the creditor to proceed under these circumstances against the surety, against which equity would relieve. In this instance, the surety was primarily liable as an acceptor, and there was no pretence that it had

been agreed collaterally or otherwise, that he should be regarded merely as a surety. The equity, consequently, arose not from any contract with the creditor, but from it being inequitable in him knowingly to prejudice the rights of the surety against the creditor. And as the injury to the surety, was the same whether his obligation was direct as a maker or indirect as a guarantor, it was a good ground in either case for relief in equity, or an equitable plea in law.

These decisions are in accordance with the doctrine advanced in *Harris v. Brooks*, that evidence that one of the parties to a note is a surety, tends not to vary the contract, but to prove a collateral fact and rebut a presumption (ante, 430). It was justly said, that if one promisor annexes the word principal to his signature, and the other signs as surety, their obligation to the promisee is essentially the same as if their relation to each other was not described. The only difference is, that he has notice from the writing of that which it would otherwise be requisite to prove *aliunde*. Prima facie joint obligors or contractors, are equally liable as between themselves as well as to the principal. When, however, the question is one of indemnity or contribution, it may always be shown that the consideration moved exclusively to one, and that the burden should devolve on him. This doctrine may have originated in equity, but has long been recognized by the common law. 1 Leading Cases in Eq. 170, 3 Am. ed., 2 Id. 571, part 2; *Wright v. Simpson*, 6 Vesey, 714; *Williams v. Williams*, 5 Hammond, 444; *Odlin v. Greenleaf*, 3 New Hampshire, 270; *Gibbs v. Bryant*, 1 Pick. 118; *Peters v. Barnhill*, 1 Hill, S. C. 234; *Hunt v. Amidon*, 4 Hill, 345; *Blaisdell v. Gladwin*, 4 Cushing, 373; *Vail v. Foster*, 4 Comstock, 312.

It applies after the contract has passed into judgment as well as before (ante); *Mauri v. Heffernan*, 13 Johnson, 58, and may be enforced on behalf of a sole obligor against a stranger to the instrument; *Lea v. Rook*, Mosely, 318; *Moore v. The Westley Church*, 10 Barr, 273; as in the common case where a note is given for the accommodation of a third person. If one of the defendants in a judgment proceeds against the other for contribution, the law will look behind the record to the instrument on which the suit was brought (ante, 430), and if that does not disclose the truth or implies an equal obligation, the distribution of the burden may still be regulated by extrinsic evidence. In *Mauri v. Heffernan* the principal was accordingly held liable to the surety for the whole amount of a judgment which had been recovered against them jointly on a note which both had signed as principals. In like manner a principal is bound to indemnify a surety who gives a mortgage for his benefit, although his name does not appear in the instrument. *Lea v. Rook*; *Moore v. The Wesley Church*. So the right of an accommodation maker or acceptor to maintain assumpsit after payment against a drawer or endorser for whose

benefit the instrument was issued, is of every-day occurrence, and too well settled to be questioned. *The Grafton Bank v. Kent*, 6 New Hampshire, 221; *Griffith v. Reed*, 21 Wend, 302; *Bury v. Ransom*, 2 Kernan, 462. As the equity may be established, so it may be overcome by parol evidence, and it will be a defence to a suit by an accommodation acceptor of a bill against the drawers jointly, that he knew one of them to be a surety for the other. *Griffith v. Reed*, 22 Wend. 502; *Suydam v. Westfall*, 4 Hill, 211; *Wing v. Terry*, 5 Id. 160; *Thomas v. Van Brunt*, 19 Barb. 410. It was conceded in *Wing v. Terry*, that drawing a bill without funds is a request to the drawee to advance the money, carrying with it an implied promise of reimbursement. But it was said that this presumption might be repelled by evidence that the acceptor knew that one of the drawers put his name to the instrument for the accommodation of the other, and that he would be precluded by the statute of frauds from showing that he did so in pursuance of an oral agreement to indemnify the acceptor. This is, however, contrary to the general rule that an equity rebutted by parol may be re-established by the same means. 1 Smith's Leading Cases, 479, 6 Am. ed.; 1 Leading Cases in Eq., 3 Am. ed. 162, 169. See *Batson v. King*, 4 H. & N. 739. In *McGee v. Prouty*, 9 Metcalf, 457, one of the makers of a joint and several promissory note, who had signed as "surety," brought assumpsit for money paid, laid out and expended against the others, whose signatures had no such qualification. But as one of the defendants was shown to be a surety by extrinsic evidence, it was held that there could be no joint liability, although they might be severally liable to the plaintiff, with a right of action over as between themselves. The question is, however, not free from difficulty, and seems to have been differently viewed in *Nicholls v. Parsons*, 6 New Hampshire, 30.

It being established under these decisions that the equity of the surety may be shown *aliunde* when it does not appear from the writing, it remains to consider whether such a defence can be taken advantage of at law. And here there can be little doubt as already intimated, that an injury done collaterally to the right of subrogation is one of those constructive frauds which belonged to the exclusive jurisdiction of equity, and could not be made the subject of a plea in bar. A guarantor may be legally discharged by the exoneration of the principal, but a party who binds himself directly cannot allege that he is a guarantor. Accordingly, in England, and until recently in the United States, a co-obligor or promisor, who had been discharged by time given to the principal, was forced to go into equity and could not obtain relief at law. *Waters v. Simpson*, 2 Gilman, 576; *Bull v. Allen*, 9 Connecticut, 19; *Shaw v. McFarlane*, 1 Iredell, 216; *Ward v. Johnson*, 6 Munford, 6; *The State Bank v. Locke*, 4 Devcreux, 529; *Lewis*

v. *Harbin*, 5 B. Monroe, 564; *The United States v. Howell*, 4 W. C. C. R. 620 (ante); *Manning v. Shotwell*, 2 Southard, 584; *Pontard v. Davis*, 1 Spencer, 215. In some instances this was said to be because the defendant was estopped by the seal from showing the true nature of the contract; *Deberry v. Adams*, 9 Yerger, 52; *Dozier v. Lee*, 7 Humphreys, 520; while the ground taken in others was that as an instrument under seal cannot be varied by parol, the agreement for time was null, both as to the principal and surety; *Steploe v. Honey*, 7 Leigh, 501; *Tate v. Wymond*, 7 Blackford, 240; *Locke v. United States*, 3 Mason, 446; but the line was drawn with more accuracy in *Shaw v. McFarlane*, where it was said by Ruffin, C. J., "that a court of law deals only with legal liabilities and legal discharges. If two persons are bound by a bond or a judgment for the payment of a sum of money, the one is liable to the creditor in the same manner, and to the same extent as the other, although as between themselves, they stand as principal and surety. In respect of the creditor, they are joint debtors, fixed with the same obligation, and what discharges one discharges the other, and nothing less. An agreement for indulgence to the principal does not amount to satisfaction; and nothing, *in pais*, can discharge an obligation or a judgment, but performance or satisfaction." It was said in like manner in *McHenry v. Crabtree*, 6 Monroe, 104, that although a gift of time was an equitable discharge, it was not a defence at law.

It results from these decisions that a direct obligation will not be legally discharged in favor of a surety by a transaction that would not have that effect if he were a principal. *Lewis v. Harbin*, 5 B. Monroe, 564; *Bell v. Allen*, 19 Conn. 101; *Manning v. Shotwell*, 12 Southard, 584; *Pontard v. Davis*, 1 Spencer, 215. But the equitable doctrine that a surety will be discharged by any act which impairs the right of subrogation, gradually found its way in this country into the courts of law who applied it first to parol contracts, and afterwards, with some hesitation, to specialties (ante, 436). In *The Bank of Steubenville v. Leavitt* (ante, 424) the court said that the adoption of it as a legal rule, was almost within their own times. It is now administered by the English courts under the statute of Victoria, which authorizes equitable defences to be made by plea. A similar practice was introduced with marked advantage, in Pennsylvania, while yet a colony, to supply the want of a court of chancery, and the course of her tribunals has not been without its influence on those of the other States. The doctrine as a legal one is of recent growth, but it now prevails in either jurisdiction, and New Jersey and North Carolina are perhaps the only parts of the Union where the peculiar equity of the surety cannot be vindicated without a recourse to chancery, (ante). *Shroepfel v. Shaw*, 5 Barbour, 580; 3 Comstock, 446;



*Austin v. Dorwin*, 21 Vermont, 38; *Gifford v. Allen*, 3 Metcalf, 255; *Greely v. Dow*, 2 Id. 176; *Rathbone v. Warren*, 10 Johnson, 587; *Crosby v. Wyatt*, 10 New Hampshire, 318; *The Grafton Bank v. Kent*, 4 Id.; *Hutchinson v. Moody*, 18 Maine, 393; *Leavitt v. Savage*, 16 Id. 72; *Davis v. The People*, 3 Gilman, 409; *Bank v. Ela*, 11 Id. 395; *Waters v. Simpson*, 2 Id. 576; *The People v. McHatton*, Ib. 638; *Holmes v. Dale*, 1 Clark, 71; *Comegys v. Booth*, 3 Stewart, 14; *Inge v. The Branch Bank*, 8 Peters, 108; *Clippinger v. Cripps*, 2 Watts, 45; *The Bank of Steubenville v. Hoge*, 6 Hammond, 17; *Wayne v. Kirby*, 2 Bailey, 531; *Dennis v. Reeder*, 2 McLean, 451; *Ward v. Vass*, 7 Leigh, 135; *Viele v. Hoag*, 24 Vermont, 46; *Flynn v. Mudd*, 23 Illinois, 323; *The Farmers' and Mechanics' Bank v. Rathbone*, 26 Id. 19, 34; *Jones v. Jeffries*, 17 Missouri, 597; *The New Hampshire Savings Bank v. Colcord*, 15 New Hampshire, 119; *Wagman v. Hoag*, 14 Barb. 232; *Pain v. Packard*, 13 Johnson, 174 (ante, 315); *Harbert v. Diamont*, 3 Indiana, 346; *Dickerson v. The Board of Commissioners*, 6 Id. 128. In many of these instances the admissibility of the defence was taken for granted, the only question being whether it was sustained by the evidence; but in others it was the point directly adjudged. Thus in *Wayne v. Kirby*, 2 Bailey, 251, the court said, that whatever would discharge the surety in equity, might equally be resorted to by him as a defence at law. The point arose in *Davis v. The People*, and *The People v. McHatton*, upon a demurrer to a special plea to an action against a surety, that time had been given to the principal, and was determined in each instance in favor of the validity of the plea. It may be considered as established under these decisions, that such a defence does not vary or contradict the contract, and may, except in rare and exceptional instances, be made under non-assumpsit or through a special plea in bar, without the expense and delay of a recourse to chancery. *Flynn v. Mudd*, 27 Illinois, 323; *Bank of Steubenville v. Hoge*; *Leavitt v. Harris*; *Harris v. Brooks*; *Pain v. Packard*; *Carpenter v. King*, and *The New Hampshire Savings Bank v. Colcord*. If the authorities are not more numerous, it is only because the question has, in general, been regarded as too well settled to be a subject of dispute. *The Farmers' and Mechanics' Bank v. Rathbone*, *Jones v. Jeffries*.

It is well settled, that the extension of jurisdiction at law, takes nothing from the authority of chancery, which will still give those who seek its aid, without unreasonable delay, the benefit of its peculiar method of procedure, which cannot be had in a purely legal tribunal (ante, 374); 2 Leading Cases in Equity, part 2, 188, 3 Am. ed.; and hence equity will arrest the course of a legal proceeding for the purpose of enabling the defendant to make an equitable defence in the appropriate forum, even when it might be set up, in that where he has been cited to appear. Where a court of chancery once had jurisdiction, it will

insist on retaining it, although the original ground of jurisdiction, the want of a remedy at law no longer exists, and a surety may accordingly file a bill for discovery and relief, and to stay the proceedings against him, although the ground set forth in the bill might have been pleaded or given in evidence in the suit which he seeks to enjoin. *Eyre v. Everett*, 2 Russell, 381; *Kennedy v. Evans*, 31 Illinois (ante, 374). "The subject of equitable relief to sureties," said Isham, J., in *Vicle v. Hoag*, 24 Vermont, 46, 51, "is one of original jurisdiction in a court of chancery. The peculiar rights of a surety originated in, and are exclusively the growth of equity. Formerly it was held in several instances, that the remedy of the surety was only in equity, and could not be made available in courts of common law. But it is now held as a general rule, 'that the liability of sureties is governed by the same principles at law, as in equity.' And probably, with few exceptions, the same considerations which are sufficient in equity to discharge the surety, will be available for the same purpose, at law. 2 Leading Cases in Equity, 576, in notes to *Rees v. Barrington*."

Hence a court of equity will not send a party suing there, to a court of law for the discharge or relief to which he is equally entitled in equity; but will extend the same relief and exercise the same powers in behalf of sureties, that were exercised before jurisdiction of this subject was entertained at law. 2 Leading Cases in Equity, part 2, 576; *Samuel v. Howarth*, 3 Merrivale, 172; *Mayhew v. Crickett*, 2 Swans. 135, 529; *Eyre v. Everett*, 2 Russ. 382; 3 Hare, 567.

"Justice Story remarks, Eq. Juris. § 64, (i) 'That the jurisdiction of the courts of equity is not changed or affected by the courts of law now entertaining jurisdiction in cases where they formerly rejected it. They cannot enlarge or restrain the powers of a court of equity at their pleasure; for their jurisdiction is of a permanent and fixed character, and being once legitimately vested, it must remain until the Legislature shall abolish or limit it.' So in *Kemp v. Pryor*, 7 Ves. 249, Lord Eldon says, 'I cannot hold that the jurisdiction of courts of equity is not gone merely because the courts of law have exercised an equitable jurisdiction.' In all such cases the party may seek his relief at the hands of either. Neither is it in the power of a creditor, by first commencing proceedings at law, to deprive the surety from seeking his relief in chancery. And where there has been no delay or negligence in seeking relief in equity, a court of chancery will exercise a controlling power over the parties in their proceedings at law. The jurisdiction, therefore, of this court, in the case under consideration, does not depend upon the fact that this bill is framed *for discovery* as well as relief. For it would be entertained for relief if no discovery had been asked, as being a matter within its original jurisdiction."

This decision would seem preferable to that in *Dickerson v. The*

*Board of Commissioners*, 6 Indiana, 128, where the failure of the surety to make out his case at law was said to deprive him of the right to appeal to chancery. The powers of a chancellor, are, however, to a great extent discretionary, and he may always consider before arresting the course of legal proceedings, whether there will be any substantial advantage gained to compensate for the delay.

If we now turn from the question of jurisdiction to the more substantial inquiry, who is entitled as a surety? it will appear that the relation must ordinarily be created by an express or implied contract with the principal, and will not arise from the officious assumption of an obligation by a stranger, on behalf of another who has not asked his assistance. *Talmage v. Burlingame*, 9 Barr, 21. A request to a third person to be answerable for me, carries with it an implied promise of indemnity and repayment; but as a man cannot make another his debtor, by paying a debt due by the latter without his assent, so an officious promise to make such a payment, will not vary the case. *Carter v. Black*, 4 Dev. & Bat 425. But the creditor has the full right of an owner over the debt, and may make any disposition of it which is not inconsistent with the rights of the debtor. He may consequently sell or assign it for a valuable consideration, and thus render the debtor accountable to the assignee, whether he has or has not consented to the assignment. The power of going to this extent, necessarily involves that of stopping short at any intermediate point, and effecting an insurance of the debt, in the form of a guaranty. And as every such contract operates as a conditional or contingent assignment, and entitles the guarantor to a cession of the interest guaranteed on payment, it necessarily binds the creditor to do nothing that will render it less valuable, or preclude him from transferring it to the guarantor, in the state in which it was when first guaranteed. In other words, a promise to be answerable for the payment of a debt, as a guarantor or surety, will entitle the promisor to all the remedies of the creditor, if made at his request, whether it does or does not receive the assent of the debtor, and consequently to substitution to the debt itself, and to all the collateral securities incident to, or held for it. *Elkinton v. Newman*, 8 Harris, 281. Thus, in *Carter v. Jones*, 5 Iredel, 193, the complainant, Carter, who had guaranteed a bond at the request of Boyd, the obligee, and without the knowledge of the obligors, Jones and Black, was held entitled to enforce the bond against them in equity, although wholly destitute of right at law; and Battle, J., used the following language in delivering the opinion of the court: "It is said that Carter was an officious intermeddler, and on that account, can have no claim to the interference of a court of equity. It is true that he paid the amount of the bond to Boyd, without any request, express or implied, from

the defendants Jones and Black, or either of them. He could not then have recovered at law, as was decided in a suit at law brought by him against them. *Carter v. Black*, 4 Dev. & Bat. 425. But in this court the plaintiff, Carter, stands in a very different situation. He is not suing here for money paid for the use of the defendants, at their request. He became bound on the bond, at the instance of the plaintiff, Boyd, and the defendant, Smith, and, having paid the amount of it to Boyd, he claims as an equitable purchaser of it, and seeks here to recover on it as lost, in the same manner as Boyd might do."

It is therefore plain, that the right of the guarantor to subrogation will be the same, whether he intervenes in the contract at the request and for the benefit of the creditor, or of the debtor; and it follows, that whatever would discharge him by impairing that right in one case, will do so in the other; the exoneration of a surety on equitable, as distinguished from legal grounds, being a mere corollary to his right to subrogation. The law was so held in *Talmage v. Burlingame*, 9 Barr, 21; and *Matthews v. Aiken*, 1 Comstock, 595; and again in *Peak v. Dorwin*, 25 Vermont, 28, where one of the makers of a joint and several promissory note, who put his name to it after it had been executed by the others without their knowledge or assent, was held to be discharged by a subsequent extension of the time of payment. "The case of *Talmage v. Burlingame*," said Isham, J., "establishes the principle, 'that if one becomes surety for another, at the request of the creditor, and without the knowledge of the principal debtor, the creditor is bound, by all the rules respecting the sureties, though the principal debtor is not bound, for the want of a privity of contract between them.' If Dorwin, before the contract for delay was made, had been called upon by the plaintiff, and had paid the note, he would have been entitled, by subrogation, to all the rights, and remedies of the creditor against the other parties thereon, and would stand as a purchaser of the note. This right of subrogation exists in equity, not only where the strict relation of principal and surety is formed, 'but where one is compelled to pay the debt in order to protect his own interests;' 1 Leading Cases in Equity, 88-94, notes. In the case of *Wilkes v. Harper*, 2 Barb. Ch. R. 338, the chancellor observed, 'that it is a well settled principle of equity, that when one person, or his property, stands in the situation of a surety for the payment of a debt, and for which payment another person or his property is primarily liable, the one who is secondarily liable, upon his paying the debt to the original creditor, is entitled to be subrogated, to all the rights and remedies of such creditor, as they then exist, against the principal debtor or his property.' This rule has its foundation, not in the contract of the parties, but in the elementary principles of jurisprudence. The same doctrine is sustained in the case of *Matthews v. Aiken*, 1

Coms. 595, and 2 Leading Cases in Equity, part 2, 561, in notes to *Rees v. Berrington*. Any act of the plaintiff, therefore, that altered the terms of the original contract, or placed Dorwin in a situation different from what he at first assumed, would effect his discharge on the note. After the contract for delay was made, if the debt had been paid by Dorwin, he could not have been subrogated to, and prosecuted the note, without violating the contract for delay which the plaintiff had made. He has, therefore, been affected by that contract in the same way, and to the same extent, as if he had signed the note, and at the request of and as surety for the Boyntons. And any agreement, or act of the plaintiff, which would discharge the liability of sureties, who signed as such, at the request of the Boyntons, will equally discharge the defendant."

We have seen that a party who binds himself to a direct performance may show that he is a surety by extrinsic evidence, even when the instrument is in writing and under seal. *Pooley v. Harradine*, 7 E. & Bl. 481; *Greenough v. McLelland*, 2 El. & El. 424; *Riley v. Gregg*, 16 Wisconsin, 666; *Ward v. Stout*, 32 Illinois, 399; *Kennedy v. Evans*, 31 Illinois, 238; *Flynn v. Mudd*, 27 Id. 323. Such proof does not contradict the instrument, and merely establishes the existence of a collateral relation between the obligors. An estoppel must be certain, and will not be raised by inference. When, however, an obligor or contractor binds himself expressly as a principal, he will be precluded from showing that such is not his true character. Such a covenant or stipulation may be regarded as a waiver of the equity of the surety, carrying with it an implied authority to act as if all the contracting parties were primarily as well as directly liable. In *Spriggs v. The Bank of Mt. Pleasant*, 10 Peters, 257, 14 Id. 201, a recital that the obligor had bound himself as principal, and not as surety, was held to estop him from setting up a defence on the ground of suretyship. The point arose subsequently on a bill filed to restrain the obligee from proceeding on the judgment which he had obtained at law, and it was contended on behalf of the complainant that the estoppel was technical and legal, and should not be allowed to shut out the truth when necessary for the attainment of justice. The court were, however, of opinion that there was no sufficient ground for an injunction. The rule for the interpretation of contracts was the same in both jurisdictions—to follow the meaning of the parties as gathered from their words. There was nothing in the terms of the bond contrary to public policy, or that might not be enforced consistently with good faith.

It was held, in like manner, in the *Claremont Bank v. Wood*, 10 Vermont, 182, that when the makers of a joint and several promissory note bind themselves in terms as principals, it cannot be shown that one is a surety and discharged by time given to the other.

The liability of the acceptor of a bill is direct and primary, and that of the drawer merely secondary and contingent. That this is not a mere implication appears from the form of the contract, which is that of a request on one side and an undertaking in pursuance of it on the other. It is, therefore, within the doctrine enunciated in *Spriggs v. The Bank of Mt. Pleasant*, that a party who declares himself to be a principal cannot deny that such is his true character. It was accordingly held in *Fentum v. Peacock*, 5 Taunton, 551, that the acceptor of a bill cannot show as against the holder that he put his name to the instrument without consideration for the accommodation of the drawee, and is equitably discharged by time given to the latter. The point was decided in the same manner in *Maury v. Judah*, 6 Cowen, 484; and it was said to make no difference that the holder took the bill as collateral to an antecedent debt, and with the full knowledge that the acceptance was given without value and as an accommodation. The relation of the maker of a note to the other parties is like that of an acceptor, primary and absolute. He cannot, therefore, claim to be a surety and discharged by time given to the endorser. *The Bank of Montgomery v. Walker*, 9 S. & R. 229, 12 Id. 332. The doctrine is generally recognized and has been followed without exception in the United States. In *Lewis v. Hanneman*, 2 Barr, 416, the endorser gave a mortgage as security which the creditor failed to put on record. And it was contended the loss arising from this neglect should fall on him, and not on the defendant who had made the note for the accommodation of the endorser. The defence was, however, overruled on the ground that the maker had contracted as a principal and could not assert the equity of a surety. The authorities do not, however, go so far as to sanction a recovery that would result in a circuit of action, and an accommodation maker may, like other sureties, set off a debt due by the plaintiff to his principal.

The question was reviewed in *The Farmers' Bank v. Rathbone*, 26 Vermont, 19, 34. The court said "there is a material distinction between joint and several promissory notes or obligations, and bills of exchange or notes on which the parties have assumed successive liabilities. In the former case, as between the makers and a holder who received the note with notice of the circumstances under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting the instrument, but as consistent with its terms; and the right of contribution arising out of that relation exists between them. 2 Am. Lead. Cas. 430, 445, in notes. But the drawer and acceptor and endorsers of a bill or note have not assumed a joint and several liability; neither are they strictly sureties; but are liable to each other in the order of their becoming parties; and when the action is on the

bill or instrument, creating such successive liabilities, by an endorsee for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive liabilities into a joint and several obligation, or placing them in the relation of principal and surety. The testimony clearly contradicts the express terms of the bill, and materially changes its legal effect. Unquestionably those liabilities may be changed as between the parties, by an express contract to that effect, which may be enforced between them. But this in no way affects the rights of a holder, who, became such in ignorance of that arrangement. Under such circumstances, the holder has only to look to the bill itself and the genuineness of the signatures, to ascertain the nature and extent of the liability of the parties thereon; and they are liable to him in the successive order in which their names appear upon the face of the bill. *McDonald v. Magruder*, 3 Peters, 471; *Flint v. Day*, 9 Vermont, 328; *Brown v. Mott*, 7 Johns, 360."

"It is, accordingly, the generally established rule that the parties to a bill or note, are bound by the character which they assume upon the face of the bill; if by that they are liable as primary principal debtors, then, as to the holder, they are bound as such; and his knowledge at the time when he takes the bill, that they, or any of them are accommodation parties, will not vary the case. *Montgomery Bank v. Walker*, 9 Serg. & Rawle, 229, 12 Serg. & Rawle, 382; *White v. Hopkins*, 3 Watts & Serg. 99; *Lewis v. Hinchman*, 2 Barr, 416; *The Commercial Bank v. Cunningham*, 24 Pick. 275; *Church v. Barlow*, 9 Pick. 551; *In re Babcock*, 2 Story's C. C. 398; *Sanford v. Lambert*, 2 Blackford, 137; *Clopper, Administrator, v. Union Bank of Maryland*, 7 Har. & J. 92."

The course of decision has not, however, been uniform in England, and after following *Fentum v. Peacock*, now tends in the opposite direction. In *Laxton v. Peat*, 2 Campbell, 185, an accommodation acceptor was said to be a surety, who would be discharged by time given to the drawer, with notice that such was their relation. And Lord Eldon seems to have thought in *Ex parte Glendennning*, Buckley, 517, that it depends on whether the holder knew that the acceptance was for accommodation when he took the instrument, and that if he did not, his rights could not be varied subsequently by notice. This distinction was adopted and enforced in *Strong v. Foster*, 17 C. B. 201; while it was said in *Manly v. Boycott*, 2 Ellis & Bl. 46, and *Yates v. Donaldson*, 5 Maryland, 389, that proof that one of the makers of a note is a surety, will not be sufficient unless it is also shown that the plaintiff agreed to deal with him in that capacity, and not as a principal. It was, however, finally decided in *Davis v. Stainbank*, De G. M. & G. 679, that an accommodation acceptor is entitled to all the rights and privileges

of a surety, not only as between himself and the drawer, but against every one who knows his true position, even when such knowledge is not acquired until after value has been given for the instrument. This case was cited and followed in *Pooley v. Harradine*, 7 E. & Bl. 431, when Coleridge, J., said, that "if the equity does not depend on any contract with the creditor, but on its being inequitable in him knowingly to prejudice the rights of a surety against the principal, the equity would seem to extend to the case of a creditor, knowing the existence of the relation of suretyship only at the time of his dealing in such manner with the principal debtor, as to prejudice the rights of the surety." It may, therefore, be considered as established in England, that a holder who gives time to a drawer or endorser, knowing that he is a principal, and the maker or acceptor merely a surety, will discharge the latter.

It has been said that a party who binds himself directly as co-obligor or contractor by an instrument which does not disclose that he is a surety, is as much precluded from showing that such is his character, as if he was expressly described as a principal. The law was so held in *Yates v. Donaldson*, 5 Maryland, 389; *The Claremont Bank v. Wood*, 10 Vermont, 582; and *Beale v. Allen*, 19 Connecticut, 101; and gain in *Strong v. Foster*, 17 C. B. 201; and *Manley v. Boycott*, 2 E. & Bl. 201; although it was said that the case might be different if the plaintiff knew that the maker of the note was a surety, and agreed to treat him as such, at the time of taking the instrument. The doctrine of *Sprigg v. The Bank of Mt. Pleasant*, does not, however, when justly viewed, go so far, and it is now generally established, both in England and this country, that the union of two or more obligors or promisors in a direct engagement, will not preclude either of them from showing that he has certain collateral rights and remedies, which have been knowingly impaired by the creditor. *The Lime Rock Bank v. Millett*, 42 Maine, 258, 349; *Pooley v. Harradine*; *Greenough v. McClelland*, 2 El. & El. 424; *Riley v. Gregg*, 16 Wisconsin, 668 (ante, 445); *Flynn v. Mudd*, 27 Illinois, 323; *Kennedy v. Evans*, 31 Id. 258. Such a defence does not contradict the writing, and an estoppel will not be raised to exclude the truth unless the parties clearly intend that it should not be given in evidence. When, however, a party declares in terms that he contracts as a principal, there can be no doubt as to his meaning, and effect will be given to it as in other instances.

As the discharge of the surety by the alteration of the contract with the principal is an equity, it is not binding without notice. *Kaighn v. Fuller*, 1 McCarter, 419. It would obviously be unjust to hold the principal liable for the disregard of a right which he has no sufficient means of knowing. When, therefore, as in the ordinary case of a joint and several bond or promissory note, the surety appears on the



face of the contract as a principal, the creditor is entitled to suppose that such is his real character, and may act accordingly, until the truth is brought home to him by some communication sufficiently authentic to bind his conscience. *Ghan v. Niemcewicz*, 3 Paige 614, 11 Wend. 312; *Hollier v. Eyre*, 9 Cl. & F. 1; *Elwood v. Dieffendorf*, 5 Barb. 398; *Wilson v. Foot*, 11 Metcalf, 285; *Harrison v. Courtauld*, 1 B. & Ad. 36; *Smith v. Jones*, 2 Id. 50, note; *Burke v. Cruger*, 8 Texas, 66; *Nichols v. Parsons*, 6 N. H. 30. In *Nichols v. Parsons*, time had been given by the equitable assignee for whose use the suit was bought. The court held, that to render the defence available, it must appear that the equity of the surety was known to the assignee and that notice to the legal plaintiff was not sufficient.

It was said in *Manly v. Boycott*, 2 E. & Bl. 46, 56, that the holder of a note could not be prejudiced in the exercise of his rights, by being told after he took the instrument that one of the makers was a surety. The weight of authority, however, clearly is that the time at which such a communication is made is immaterial, if the creditor is put on his guard before the commission of the act which is alleged to have discharged the surety. For, as the equity of the latter is founded on a principle of natural justice and not on contract (ante, 446), so the creditor is bound to respect it, whether he did or did not know that it existed when the contract was originally made. *The Lime Rock Bank v. Millet*, 42 Maine, 349; *Pooley v. Harradine*, 7 E. & Bl. 431; *Davies v. Stainbank*, 6 De G. M. & G. 679; 2 Leading Cases in Equity, part 2, 573, 3 Am. ed. The law was so held in *The Branch Bank v. James*, 9 Ala. 469, in obedience to what was said to be the general course of decision, although the court seem to have thought that if the question were an open one, there might be room for doubt.

Although a surety cannot claim to be a guarantor at law, a guarantor has all the rights of a surety in equity, and will be discharged by time given to the principal, or by any material variation of the contract, either before or after breach. *Samuel v. Howarth*, 3 Merivale, 272; *Carter v. Jones*, 5 Iredell, 193; *Peake v. Dorwin*, 25 Vt. 28; *Calvert v. The London Dock Co.*, 2 Keene, 638; *Weed v. Grant*, 30 Conn. 74. This will be true, even if the default or alteration does not vary the legal aspect of the case, and would not be a technical defence at law. *Calvert v. The London Dock Co.*

It was notwithstanding said in *Talmage v. Dale*, 9 Barr, 83, that the position of a guarantor differs so essentially from that of a surety that he will not be discharged by an extension of the debt which does not result in injury. This decision can only be explained by the peculiar view taken of the contract of guaranty in Pennsylvania, under which it is *prima facie* an undertaking for the solvency of the principal, and that the debt may be collected by the use of due diligence (ante, 135).

If the effect of this interpretation is to deprive the guarantor of the right to insist on punctual payment, he obviously cannot complain of an agreement to give time to an insolvent debtor who has no property or effects that could be reached by a judgment. This explanation, however, only applies where the principal is insolvent when the debt matures; and in *Campbell v. Baker*, 10 Wright, 243, a guaranty of a note was held to be discharged by time given to the maker as against every one whose liability on the instrument is secondary to his own.

A drawer or endorser is like a surety, entitled to subrogation, and if time is given or any other act done which prejudices this equity he will be discharged. *Hubly v. Brown*, 16 Johnson, 70; *Wood v. The Jefferson County Bank*, 9 Cowen, 194; *Newcomb v. Rayner*, 21 Wend. 108; *Okie v. Spencer*, 2 Wharton, 253; *Walters v. Swallow*, 6 Id. 440; *Dundas v. Sterling*, 4 Barr, 73; *The Manufacturers' Bank v. The Bank of Pennsylvania*, 7 W. & S. 335; *The Union Bank v. McClung*, 9 Humphreys, 98; *Sargent v. Mason*, 6 Mass. 85; *Shurtliffe v. Gilbert*, 1 Bay, 466; *Sharpe v. Baugley*, 1 Constitutional Court R. 373; *Couch v. Waring*, 9 Conn. 261; *Seventh Ward Bank v. Stanwick*, 2 Story, 416; *Hawkins v. Thompson*, 2 McLean, 111; *Woodman v. Eastman*, 10 New Hampshire, 359; *Taney v. Littlejohn*, 2 Hawks, 525; *English v. Darley*, 2 Bos. & Pul. 61; *Gould v. Robson*, 8 East, 576; *Philpot v. Briant*, 4 Bing. 717. A like result will follow from the negligence or misfeasance of the creditor in dealing with the remedies or securities for the debt. *Lyon v. The Huntington Bank*, 12 S. & R. 61; *Ramsey v. The Westmoreland Bank*, 2 Penna. R. 203; *The Bank v. Fordyce*, 9 Barr, 206. In *Pitts v. Congdon*, 2 Comstock, 352, an endorser was, however, held to be a guarantor who could not claim the privilege of a surety without showing that he was such in fact. The holder was accordingly said to be entitled to recover notwithstanding the cancellation of a mortgage given by the maker, and the same point was decided in *Hurd v. Little*, 12 Massachusetts, 302. These decisions are, however, questionable. The rule that the loss of a security through the negligence of the creditor will exonerate the debtor wholly or *pro tanto* is a general one, applying to principals as well as sureties, and will therefore operate in favor of an endorser.

It is, however, generally conceded that the endorser is not within the rule enunciated in *Pain v. Packard*, and will not be discharged by the refusal of the creditor to proceed by suit in obedience to a notice to that effect. *Stafford v. Yates*, 18 Johnson, 327; *Trimble v. Thorne*, 16 Id. 152; *Beebee v. The West Branch Bank*, 7 Watts & Serg. 375; *Freeman's Bank v. Rollins*, 1 Shepley, 202, 3 Id. 249; *Fiddy v. Campbell*, 2 Brevard, 21; *Low v. Underhill*, 3 McLean, 376 (ante).

The privilege of a surety may exist where there is no personal liability. *Gahn v. Niemcewicz*, 3 Paige, 614, 11 Wend. 312, 316, 324. A person

who pledges his estate for the benefit of another is entitled to indemnity, and to use all the remedies of the creditor as means for the attainment of that end. *Lea v. Rook*, Mosely, 318; *Moore v. The Wesley Church*, 10 Barr, 223; and if this right is wilfully impaired or violated he will be discharged; *Christner v. Brown*, 16 Iowa, 130. A mortgage by a wife for the debt of her husband falls within this principle. *Gahn v. Niemcewicz*, 2 Leading Cases in Equity, part 2, 591, 3 Am. ed., and any act of the creditor which prejudices her equity will divest the lien of the mortgage. *Loomer v. Wheelwright*, 3 Sandford Ch. 135; *Sherdle v. Washlee*, 4 Harris, 134. In *Gahn v. Niemcewicz*, however, the court inclined to the opinion that time given to the husband would not discharge the land of the wife unless it resulted in actual injury.

The principle is a general one, and applies wherever the right to subrogation is knowingly impaired to the prejudice of a party by whom it might be enforced. When, for instance, land bound by the lien of a mortgage is sold in parcels to successive purchasers, the first purchaser will be entitled to exoneration at the expense of the second, and if the latter is released from the mortgage it cannot be enforced against the former, 2 Leading Cases in Equity, 271, 3 Am. ed.

It was held in many of the earlier cases that the privilege of the surety ceased upon judgment, or to speak more accurately, was merged in the new and higher obligation which superseded the original cause of action. The withdrawal of an execution against the maker of a note, was accordingly said, in *Lenox v. Prout*, 3 Wheaton, 520, not to discharge the endorser; and there have been repeated decisions to the same effect where a surety was in question. *La Farge v. Herter*, 3 Denio, 157; *Naylor v. Moody*, 3 Blackford, 93; *Deberry v. Adams*, 9 Yerger, 52; *Findlay's Ex'rs v. The Bank of the United States*, 2 McLean, 44; *Marshall v. Aiken*, 25 Vermont, 238; *Herrick v. The Orange Co. Bank*, 1 Williams, 584.

These decisions are obviously a mere extension or application of the doctrine that a party who incurs a direct obligation is estopped from showing that it is secondary or collateral. But we have seen that the equity of the surety is independent of the form of the contract, and arises from a collateral right which the judgment does not in any wise impair. A surety is as much entitled to indemnity after judgment as he was before, and may require that all the remedies of the creditor, including the judgment, shall be used for his benefit (ante, 395). The judgment cannot, therefore, preclude the right which it may be used to enforce.

It is accordingly established that the equity of the surety is not precluded by the recovery of a joint or several judgment; *Bangs v. Strong*, 10 Paige, 11, 7 Hill, 250, 4 Comstock, 315; *Boughton v. The Bank of New Orleans*, 2 Barbour's Chancery Reports, 458; *Storms v. Thorn*,

3 Barbour, 314; *Hubbell v. Carpenter*, 5 Id. 520, 1 Selden, 171; and the principal case shows that it may be enforced at law. *Blazer v. Brently*, 15 Ohio, N. S. 57; *The Commonwealth v. Miller*, 8 S. & R. 452; *Potts v. Nathans*, 1 W. & S. 155; *The Manufacturers' Bank v. The Bank of Pennsylvania*, 7 Id. 335; *Talmage v. Burlingame*, 9 Barr, 21; *Newell v. Price*, 4 Howard, Miss. 684; *Carpenter v. Denon*, 5 Alabama, 710; *The Commercial Bank v. The Western Reserve Bank*, 11 Ohio, 444; and *Cowan v. Colbert*, 3 Georgia, 239. Whether time given to the maker of a note or the withdrawal of a levy on his goods will discharge the endorser after judgment against both, is a more doubtful question, which was decided in the negative in *Lenox v. Prout*, 3 Wheaton, 520; and affirmatively in *The Manufacturers' Bank v. The Bank of Pennsylvania*.

A several judgment could not be entered at common law on a joint cause of action, and the failure of the plaintiff to make out his case against one of two co-defendants, was consequently a defence to both. It has accordingly been said that an allegation that one of the defendants in a joint action is a surety and has been discharged by time given to the other, is inadmissible in a court of law, and that the remedy must be sought in equity. *Farrington v. Myers*, 10 Ohio, 543; *Yates v. Donaldson*, 5 Maryland, 389; see *Marshall v. Aiken*, 25 Vermont, 321; *The Boston Hat Co. v. Messenger*, 2 Pick. 223. The objection is a technical one, which should not be allowed to stand in the way of substantial justice, and may be obviated by entering a *nolle prosequi* against the surety, and proceeding to judgment against the principal; *Wolff v. Fink*, Barr, 435; agreeably to the practice when bankruptcy or infancy is pleaded by one of several defendants.

We have seen that a surety will be discharged by any variation of the agreement which deprives him of the right to require that it shall be performed punctually and according to its terms. The doctrine is well established, and has been enforced repeatedly both in the United States and England. *Christine v. Brown*, 16 Iowa, 130; *Gowan v. Holloway*, 13 Id. 154; *Carroll v. Allen*, Ib. 289; *Austin v. Darwen*, 21 Vermont, 38; *Greeley v. Dow*, 2 Metcalf, 176; *Miller v. McC'an*, 7 Paige, 452; *Bangs v. Strong*, 11 Id. 11, 7 Hill, 250; *Dundas v. Sterling*, 4 Barr; *The Manufacturers' and Mechanics' Bank v. The Bank of Pennsylvania*, 7 W. & S. 335; *Campbell v. Baker*, 10 Wright; *Ward v. Stout*, 32 Ill. 399; *Flynn v. Mudd*, 27 Illinois, 333; *Montague v. Mitchell*, 28 Id. 481; *Reilly v. Gregg*, 16 Wisconsin, 666; *Wright v. Bartlett*, 43 New Hampshire, 548; *Weed v. Grant*, 30 Conn. 74; *Worthan v. Brewster*, 30 Georgia, 112. It applies not only where there is a gift of time, but where the contract undergoes any material alteration; *Eyre v. Bartrap*, 3 Maddox, 221; *Rowan v. The Sharp's Rifle Co.*, 33 Connecticut; as by agreeing that the building which the principal contractor is to put

up, shall be four stories instead of three, and extending the period for the completion of the work.

In *Rowan v. The Sharp's Rifle Co.*, rifles were, by the terms of the original agreement, to be manufactured by the principal with all possible dispatch, and a certain amount retained from the price to repay advances. It was subsequently agreed without the consent of the surety, that 300 rifles per week should be made at first, and 600 per week afterwards, and that a larger sum should be kept back to meet advances. The surety was held to be discharged. So an agreement to submit the contract to arbitration, will discharge the surety if the award varies the time or mode of performance. *Coleman v. Wade*, 2 Selden, 44.

The equity is independent of the form of the contract; *Watts v. Shuttleworth*, 5 H. & N. 235; *Pearl v. Deacon*, 24 Beavan, 186; and may arise when the surety is bound jointly with the principal (ante, 445); *Flynn v. Mudd*, 27 Illinois, 323; *Jones v. Fleming*, 15 Louisiana, 522; or enters into a several and distinct engagement for his benefit (ante, 459). *Davis v. Stainbank*, De G. M. & G.; *Christine v. Brown*, 16 Iowa, 130; see *Moore v. The Wesley Church*, 10 Barr, 223.

It is not necessary that the contract should be legally varied, or that the agreement for time should be pleadable in abatement or bar to an action brought for the collection of the debt, it is enough that it should be so far perfected, that it would be a good answer to a bill filed by the surety to compel the fulfilment of the contract as it was originally made; *Austin v. Dorwin*, 21 Vermont, 38; *Samuel v. Howarth*, 3 Merivale, 272; *The Bank of Ireland v. Beresford*, 6 Dow, 238. Nor does it matter how long the delay is to continue; an agreement to wait for a week or a day, will be as effectual as if the suspension of the debt was to endure for a year. *Okie v. Spencer*, 2 Wharton, 253 (ante, 259); *Pipkin v. Bond*, 5 Iredell Eq. 91; *Fellows v. Prentiss*, 3 Denio, 512; *Cox v. The Mobile R. R. Co.*, 37 Alabama, 320. If there be an appreciable interval of time, during which the surety is precluded from asserting his equity to enforce all the remedies and securities of the creditor, he will be discharged. Any other course would involve the necessity for defining that arbitrarily, which the parties have already fixed. If the hands of the creditor are tied during an appreciable period, however brief, the surety will be equitably exonerated from the debt. The contract is no longer that which he made, and the courts will not substitute another for it (ante, 369). *Pipkin v. Bond*, 5 Iredell Eq. 91; *Bangs v. Strong*, 7 Hill, 250.

To produce this result, the agreement for time must, however, be legally binding on the creditor, or, to speak more accurately, must be such as to confer a right on the principal which might be vindicated by an action for damages, and which would be a sufficient answer to a

bill filed by the surety to enforce the punctual payment of the debt. It must, therefore, be certain or capable of being reduced to certainty, and sustained by a seal or consideration. An indulgence which is purely permissive and which the creditor may terminate at pleasure without incurring a liability in damages, will not discharge the surety. *Nevile v. Hamer*, 4 Howard, Miss. 684; *McGee v. Metcalf*, 12 Smedes & Marshall, 533; *Freeland v. Compton*, 30 Miss. 424; *Leavitt v. Savage*, 16 Maine, 72; *Wheeler v. Washburn*, 24 Vermont, 293, 295; *Draper v. Romeyn*, 18 Barb. 166; *Reynolds v. Ward*, 5 Wend. 501; *Grover v. Hoppock*, 2 Dutcher, 191; *The Board of Police v. Covington*, 26 Miss. 470; *Chichester v. Mason*, 7 Leigh, 244. A promise on one side to sell land and apply the proceeds to the payment of the debt, and on the other to wait until the sale can be effected, is invalid within this principle; *Grover v. Hoppock*; and so is a promise by the creditor to forbear until he requires the money to pay for a house which he is about to build, and by the debtor to pay interest in consideration of such forbearance. *Reynolds v. Ward*. If, however, the creditor binds himself not to sue, the agreement need not define the period during which the indulgence is to continue. *Hudders v. Brown*, 18 Alabama, 141; *Cox v. The Railroad Co.*, 37 Id. 320, 325. That is certain which can be made so, and a promise to forbear generally will be construed as meaning a reasonable forbearance (ante, 99). A plea that the creditor postponed the day of payment for a valuable consideration may therefore be good without setting forth for how long, or until what particular time. *Hudders v. Brown*. Such, at least, would seem to be the better opinion, although decisions may be found that such an agreement is void because of uncertainty, and cannot be set up either by the principal or surety. A general promise of forbearance has been said to be too vague to be binding even as between the parties (ante, 98), and, if so, it cannot discharge the surety. It was accordingly said in *Creeth v. Simes*, 5 Howard, 192, that the surety would not be exonerated by a promise of forbearance which failed to specify the length of time during which the delay was to continue; and the cases of *Norris v. Crumme*, 2 Randolph, 328; *Alcock v. Hill*, 4 Leigh, 622; *Parnell v. Price*, 3 Richardson, 121, and *The Bank of Utica v. Ives*, 17 Wend. 501, were cited as sustaining or establishing this position. The soundness of this doctrine depends on whether an agreement for forbearance which fixes no definite period can be made certain by intendment. When the contract is to render a service or deliver goods, that is a reasonable time which will enable the promisor to fulfil his engagement by the use of diligence, but no such criterion can be applied to a contract to indulge a failing debtor. Under these circumstances time is the thing sold, and if the agreement does not specify how much the buyer is to have, the deficiency can hardly be supplied by intendment. It is accordingly

generally conceded that although forbearance at the request of the debtor may confer a right of action on the creditor, it will not vary the obligation of any one who has made himself liable for the debt. The question is not whether the creditor has acquired a right by refraining, but whether he would have himself liable by going on. In other words, to discharge the surety, there must be a promise by the creditor in consideration of something done or promised on the other side. The debtor is obviously entitled to promise further or collateral security as a motive for indulgence, and the creditor may naturally be disposed to wait in the hope that the engagement will be fulfilled; but the mere fact that such an inducement is offered on one side and accepted on the other will not operate as a new contract or suspend the debt. *Wadlington v. Geary*, 7 Smedes & Marshall, 522; *Govan v. Burford*, 3 Cushman, 151; *The Bank of Utica v. Jones*, 17 Wend. 501; *Wade v. Staunton*, 4 Howard, 631; *Ward v. Hoppuck*, 2 Dutcher, 249; *Woolworth v. Bunker*, 11 Ohio, N. S. 593, 597.

It is not necessary, however, that the debt should be actually suspended; it is enough that there is a promise to suspend it, giving a right to compensation in the event of breach, and constituting a good equitable defence to the equity of the surety to have the agreement performed as it originally stood. If an actual suspension were necessary, the surety would seldom be discharged consistently with the doctrine of the common law that an agreement for forbearance is collateral merely and not pleadable in bar, even when reduced to writing and under seal (ante, 280). *Ford v. Beech*, 11 Q. B. 852; *Webb v. Salmon*, 13 Q. B. 886, 894; 3 House of Lords Cases, 510. The point was, notwithstanding, held against the surety; in *Fullam v. Valentine*, 11 Pick. 156, which was cited with approbation in *Woodworth v. Bunker*, 11 Ohio, N. S. 593, and in *Rucker v. Robinson*, 38 Missouri, 151. But the remarks of the court in the latter case must be taken in connection with the pleadings which showed that the right of the surety was reserved. The question is, not whether the creditor can proceed at the cost of an action for damages, but, whether he has placed himself in such a position; but an application to a court of equity to compel him to proceed, would be met with the reply that he had agreed to forbear for a term that had not yet expired. It is in consequence of the prejudice to this equitable right of the surety that he is equitably discharged. If the surety's privilege is suspended, there need not be an actual suspension of the legal right of the creditor. The principle was stated accurately in *Austin v. Dorwin*, 21 Vermont, 44: "It is not necessary that the contract should be such as would prevent the creditor from sustaining an action at law on the debt until the enlarged time of payment. It is said that a covenant not to sue for a limited time does not suspend the right of action on the debt, but merely gives the cove-

nantee a remedy for the breach of it. 2 Saund. R. 48; note a. But such a covenant with the principal would discharge a surety. It is sufficient if the contract between the creditor and the principal for the extension of the time be such as to give the principal a legal remedy upon it. The doctrine, which is derived from chancery, is founded on the obligation which the contract for delay imposes upon the conscience of the creditor to perform it." It is accordingly established that an agreement for time on which an action could be maintained against the creditor will discharge the surety, though it be not a defence to the principal. *Wheeler v. Washburn*, 24 Vermont, 293; 2 Leading Cases in Equity, part 2, 563. This is also true of an agreement to vary the contract in any other material particular.

It is equally well settled that if the surety is prevented from proceeding, the courts will not inquire whether the delay is injurious. *Pipkin v. Bond*, 5 Iredell Eq. 91; *Mayhew v. Boyd*, 5 Maryland, 102; *The St. Alban's Bank v. Dillon*, 30 Vermont, 122; *Miller v. McCoun*, 7 Paige, 452; *Bangs v. Strong*, 11 Id. 11, 7 Hill, 250; *Comegys v. Booth*, 3 Stewart, 14; *Davis v. The People*, 1 Illinois, 409; *Rathburn v. Warren*, 10 Johnson, 587; *Wright v. Bartlett*, 43 New Hampshire, 348. In the emphatic language of Chief Justice Gibson, actual detriment is not the criterion or even a material ingredient. *The United States v. Simpson*, 2 Pennsylvania, 437. If the creditor has disabled himself, the surety is *ipso facto* discharged, if he has not, no eventual loss from mere delay will produce that effect. This conclusion has been criticised as extreme, *Hulme v. Coles*, 2 Simons, 12; *Gahn v. Niemcewicz*, 8 Page, 514; 11 Wend. 312; but it would seem to be the only one that can be deduced logically from the premises. The obligation is no longer what it was, and the surety is not bound by it in its altered form. *Rees v. Berriington*, 2 Vesey, 54; *Samuel v. Howarth*, 3 Merrivale, 272.

"It has been truly stated," said Lord Eldon, in the latter case, "that the renewal of these bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is, or is not for his benefit. The creditor has no right, and it is against the faith of his contract to give time to the principal, though manifestly for the benefit of the surety, without the consent of the surety." In *Huffman v. Hurlbert*, 15 Wend. 377; one of the makers of a joint and several promissory note, who had signed as surety was accordingly held to be discharged by time given to the other, although it appeared that the latter was insolvent when the note matured, and that a judgment and execution against him would have been fruitless. The court were of opinion that the agreement for delay was conclusive against the creditor, whether the surety had or had not been damnified.

If this doctrine has the inflexibility of a legal rule, it does not apply



in equity, unless the alteration is material or postpones the surety. We have seen that an agreement to advance the time of payment, may exonerate a guarantor who has agreed to be answerable at a given day (ante, 435). But a surety who has bound himself to a direct performance, will not ordinarily be discharged by an acceleration of the period at which the principal can be called upon for payment. The case of *Bowser v. Cox*, 6 Beavan, 110, 118 (ante), throws some doubt on this position; but there is an obvious difference between advancing money before the appointed time, and hastening the period at which an existing debt is to be repaid.

Inasmuch, moreover, as the discharge of the surety is an equity, it is necessarily in some measure subject to the discretion which is a distinguishing feature of equitable jurisdiction; and if it appears that the effect of an agreement for time is really to advance the remedy of the surety, regard will be had to the substance rather than to the form. In *Hulmes v. Coles*, 2 Simons, 12; the vice chancellor said, that the doctrine that time given to the principal discharged the surety, was a refinement of equity which did not apply when the nominal delay was in fact an acceleration. The surety consequently would not be discharged, by taking a cognovit from the principal with a stay of execution which expired before judgment could be obtained adversely in the regular course of practice. A plea that the creditor had accepted a confession of judgment with a stay for six months, was in like manner held insufficient in *Barker v. McClure*, 2 Blackford, 14, for not averring that the collection of the debt was in fact delayed.

The case of *Price v. Edmunds*, 10 B. & C. 578, rests upon the same principle. A cognovit was taken in settlement of a pending suit, with a proviso that it should not be entered if the money were paid punctually in certain specified instalments, the last of which fell due after the period at which a verdict might have been obtained and judgment rendered; and it was contended that this was a delay of the remedy which discharged the surety. The court were, however, of opinion that inasmuch as the first instalment was not paid when due, and the creditor thereby acquired an immediate right to execution, there had been no actual delay, and the surety was not released from his obligation.

It is well settled in accordance with these decisions that a confession of judgment with a stay of execution will not discharge the surety, unless the effect is to postpone the collection of the debt beyond the period at which the case might have been pushed to judgment and execution. *Fletcher v. Gamble*, 3 Alabama, 335; *Hallett v. Holmes*, 18 Johnson, 28; *Sever v. Heacock*, 23 Wend. 21; *Suydam v. Vance*, 2 McLean, 99. In such cases it must, however, appear that the stay did not endure beyond the period at which judgment could have been obtained, if all opposition had been withdrawn; and a court cannot go be-

yond this, or speculate on the possible duration of a contested law-suit. *Young v. Littlejohn*, 2 Hawks, 525; *Bower v. Tierman*, 3 Denio, 378. In *Comegys v. Booth*, 3 Stewart, 14; the court said, that if the creditor precluded himself from proceeding against the surety for any period of time, however brief, it would exonerate the surety, and that they would not inquire whether an agreement to permit the affirmance of a judgment which had been obtained for the debt in consideration of forbearance, had in point of fact postponed or accelerated the period at which payment could have been compelled in the ordinary course of business. In *Clippinger v. Clips*, 2 Watts, 45, the surety was in like manner held to be discharged by taking a confession of judgment from the principal with a stay of execution for a year.

Under the rule of the common law, a naked promise of forbearance is merely invalid. It will not, therefore, even when carried into execution by indulgence, discharge the surety. To produce this result, there must be a binding contract, that would be an answer to a bill filed to enforce the punctual payment of the debt, and for subrogation to the remedies of the creditor. It is not necessary that the debt should be actually suspended, but the new contract must be so far perfected that it would be a defence to an action by the creditor against the principal upon the original agreement, or that an action could be maintained upon it by the principal against the creditor. Unless this is the case there is no change in the relation between the creditor and principal, and there can be none in the right or obligation of the surety. To render a gift of time effectual in his behalf, it must consequently be sustained by a consideration or be under seal. *Wheeler v. Washburne*, 24 Vermont, 293; *Freeland v. Compton*, 30 Mississippi, 424; *Rucker v. Robinson*, 38 Missouri, 154; *McCune v. Bett*, Ib. 281; *Goodwin v. Hightower*, 30 Georgia, 249; *Halstead v. Brown*, 17 Indiana, 202; *McLemore v. Powell*, 12 Wheaton, 554; *Creath's Administrators v. Sims*, 5 Howard, 192; *Bayley v. Adams*, 10 New Hampshire, 162; *Blackstone Bank v. Hill*, 10 Pick. 129; *Bagley v. Burzell*, 19 Maine, 88; *The Lime Rock Bank v. Millett*, 34 Id. 347; *Chester v. Potter*, 36 Id. 162; *Thornton v. Dabney*, 2 Cushman, 559; *Draper v. Romeyer*, 18 Barbour, 163; *Wayne v. Kirby*, 2 Bailey, 551; *Rhoads v. Frederick*, 8 Watts, 448; *Payne v. The Commercial Bank of Natchez*, 6 Smedes & Marshall, 24; *Waddington v. Gary*, 7 Id. 522; *Joslyn v. Smith*, 15 Vermont, 353; *Waters v. Simpson*, 2 Gilmore, 576; *Braman v. Hawk*, 1 Blackford, 392; *Coman v. The State*, 4 Id. 241; *Horter v. Moore*, 5 Id. 367; *Parnell v. Price*, 3 Richardson, 121; *Miller v. Stein*, 2 Barr, 286; *Munford v. The Overseers of the Poor*, 2 Randolph, 313, *Hornberger's Ex'r v. Geiger's Adm'r*, 2 Grattan, 144; *Reynolds v. Ward*, 5 Wend. 501; *The Bank of Utica v. Ives*, 17 Id. 501; *Hunter's Adm'r v. Jett*, 4 Randolph, 104; *McKinney's Ex'r*

v. *Waller*, 4 Leigh, 434; *Alcock v. Hill*, 4 Id. 622; *McCune v. Belt*, 38 Missouri, 281.

A plea that the defendant is a surety, and has been discharged by an agreement to give time to the principal, will be bad on demurrer, unless it sets forth the existence and nature of the consideration with as much clearness as would be requisite in a declaration. *Marshall v. Aiken*, 25 Vermont, 328.

What will be a sufficient consideration is sometimes a question of much nicety, but it must in general be something done or promised to which the creditor was not previously entitled. It must also have some value, or to speak more accurately, it must not appear to be without legal value (ante, 167). It is accordingly well settled, that a promise to pay, or the part payment of that which is already due, will neither support an accord and satisfaction, nor an agreement for a perpetual or limited forbearance. *Halliday v. Hart*, 30 New York, 474; *Potter v. Greene*, 6 Allen, 442; *Matthewson v. The Sheffield Bank*, 45 New Hampshire, 104; *McCann v. Dermott*, 13 Id. 328; *Jenkins v. Clark*, 7 Ohio, 72; *The Bank v. Reynolds*, 13 Id. 84; *King v. The State Bank*, 4 English, 185. For a like reason, a promise to pay the whole at a future day, if the creditor will forbear till then, is not a consideration for an agreement, to wait in the hope that the promise will be fulfilled. *Bailey v. Adams*, 10 New Hampshire, 162; *Russell v. Buck*, 11 Vermont, 166; *Pomeroy v. Slade*, 16 Id. 222; *Wheeler v. Washburne*, 24 Id. 293; *Lynch v. Reynolds*, 16 Johnson, 91; *Van Rensselaer v. Kirkpatrick*, 46 Barb. 194. Under these circumstances, the creditor either gets nothing new, or something which is manifestly of less value, and as he is not bound, the surety will not be discharged. *Jennings v. Chase*, 10 Allen, 576; *Potter v. Green*, 6 Id. 442; *Wilson v. The Bank of Orleans*, 9 Alabama, 847. The result will be the same when the principal promises to satisfy the demand at a future day by giving goods or assets, or through the appropriation or assignment of a fund, and the creditor is thereby induced to wait for payment; *Grover v. Happock*, 2 Dutcher, 191; *Wadlington v. Geary*, 7 Smedes & Marshall, 522; *Govans v. Burford*, 3 Cushman, 157; *Newell v. Hames*, 4 Howard, 692; see *Reeves v. Hearne*, 1 M. & W. 323; unless the new agreement is mutually obligatory, and entitles both parties to insist that it shall be fulfilled. The part payment of a debt before maturity, is, however, a sufficient consideration under all the cases, for an agreement to forbear proceeding for the residue, and will consequently discharge the surety. *Uhler v. Applegate*, 2 Casey, 140; *Greely v. Don*, 2 Metcalf, 176; *Austin v. Downer*, 21 Vermont, 38; *Whittle v. Skinner*, 23 Id. 531. He will in like manner be discharged, if the creditor agrees to wait in consideration of receiving collateral or additional security which is actu-

ally given. *Whittle v. Skinner*, 23 Vermont, 531; *Moore v. Hurlington*, 46 Id. 488. *The Bank v. Jones*, 9 Alabama, 949. And it will, as we have seen, make no difference, that the transaction is beneficial to the surety, by increasing the means of payment (ante, 464). *Moore v. Hurlington*.

It results from these decisions, that if the creditor agrees to vary the contract, for a new and valuable consideration, which is actually given, he will lose the right to proceed against the surety. It is, however, established, that an executed contract, that is, a promise in consideration of value received, cannot be varied, or extinguished, by an executory agreement to substitute a new or different mode of performance for that to which the parties originally agreed (ante, 261). 1 Smith's Leading Cases, 574. As the rule is generally and familiarly stated, an accord without satisfaction is invalid, and will neither be a defence to the debtor, nor entitle him to compensation for the refusal of the creditor to carry it into effect. *Reeves v. Hearne*, 1 M. & W. 323; *Lynd v. Bruce*, 2 H. Bl. 17. If this be true as between the parties, it must be equally so when the surety is in question, unless the accord has been so far executed that a court of equity would decree a specific performance. An agreement for the suspension of a debt, and to satisfy it, should be governed by the same principle. If, as the authorities indicate, a promise by the debtor to give, and by the creditor to accept goods in payment is inoperative, both as a defence and cause of action, (*Reeves v. Hearne*,) it cannot be rendered valid by calling it an agreement for forbearance. But a promise to extend the debt in consideration of the actual receipt of interest in advance, of collateral security, or of value in any other form, is binding on the creditor and will discharge the surety if made without his assent. Such a contract is not technically pleadable in bar, but may be specifically enforced in equity, and is a good equitable defence under the Common Law Procedure Act, 13 and 14 Victoria, and in many of the States of this country. See 1 Smith's Leading Cases, 557 6 Am. ed. See *Ford v. Beech*, 11 Q. B. 852, 874; *Webb v. Salmon*, 13 Id. 886; 3 H. of L. Cases, 510; *Belshaw v. Bush*, 11 C. D. 191; *Stacey v. The Bank of England*, 6 Bing. 754.

It is well settled in accordance with this doctrine, that the payment of interest in advance will uphold an agreement for forbearance and discharge the surety. *The Grafton Bank v. Woodward*, 5 New Hampshire, 99; *Bailey v. Adams*, 10 Id. 162; *The New Hampshire Savings Bank v. Ela*, 11 Id. 335; *The Lime Bank v. Millett*, 34 Maine, 547; *Veazie v. Carr*, 3 Allen, 14; *Flynn v. Mudd*, 27 Illinois, 323; *Redman v. Deputy*, 26 Indiana, 338. And it has been held that the same result will follow where the debtor promises to pay the debt at a future day with interest and the creditor agrees to wait until the time arrives. *McComb*

v. *Kitteridge*, 14 Ohio, 348; *Chate v. Potter*, 36 Maine, 102. For as one party acquires an indefeasible right under these circumstances which he had not before, the other is entitled to insist on the stipulated delay as an equivalent. It has, however, been said, in some instances, that as a right to interest would arise by implication without an express promise, the agreement leaves the parties where they were before, and there is nothing to bind the creditor. *Gahn v. Niemcewicz*, 3 Paige, 314, 11 Wend. 312, 318; *Philpot v. Briant*, 1 Moore & Paine, 754, 4 Bing. 717. The answer to the argument is, that as the legal right to interest is contingent, a promise by which it is rendered absolute is a sufficient consideration for a promise on the other side.

In *Gahn v. Niemcewicz*, taking a note at thirty days' for the interest which had accrued on the bond, was held not to discharge the surety either wholly or *pro tanto*. The court said that as the note was not negotiable it had no greater effect than an oral promise to pay interest in consideration of forbearance which would not have been sufficient. It is no doubt true that a promise to pay interest if the creditor will forbear, is not such an agreement as will discharge the surety. Under these circumstances the promise is virtually a request, and the mutuality which is essential to the right of action does not arise until compliance. *Gahn v. Niemcewicz*, 11 Wend. 314, 321. The creditor is not bound, and may forbear or proceed at pleasure. And this is equally true when the creditor merely promises indulgence, so long as the debtor pays the interest without exacting a binding promise in return. *Philpot v. Briant*, 1 Moore & P. 754. When, however, it is mutually agreed on the one side to forbear for a definite period, and on the other, to pay the principal and interest when the credit expires, a new contract arises varying the rights given by the old. The creditor may insist on the interest of which he might have been deprived by an immediate payment, and the debtor is entitled to the forbearance for which he has promised to make compensation in the shape of interest. All the requisites to a valid contract are therefore present, and if the surety is not discharged it must be on the principle already stated, that an antecedent debt or other contract based on an executed consideration cannot be varied or discharged by an executory agreement.

The receipt of interest in advance, may in the absence of an express agreement, operate as an implied promise to forbear until the time expires for which the payment is made. *The Bank v. Pearson*, 30 Vermont, 711; *Jones v. Brown*, 11 Ohio, N. S. 601, 609; *Blazer v. Bundy*, 15 Id. 57 *Bailey v. Adams*, 10 New Hampshire, 162; *Crosby v. Wyatt*, Ib. 318. This arises from the natural presumption, that he who takes compensation, is bound to render the equivalent. If such an inference be admissible, which has been denied (*Harnsberger v. Kinney*, 13 Grattan, 511), it may be repelled by proof, that such was not the course of

business as between the parties, or in the locality where the contract was made or negotiated. Thus it has been held, that under the usage of banking in Massachusetts, the receipt of interest in advance, will not imply such an agreement for forbearance, as to preclude a bank from proceeding at once to judgment against all the parties to a note which it has discounted, whether they are principals or sureties. *The Oxford Bank v. Lewis*, 8 Pick. 458; *The Blackstone Bank v. Hill*, 10 Id. 129; and there are several decisions to the same effect in Maine. *The Stafford Bank v. Crosby*, 8 Maine, 191; *The Freemans' Bank v. Rollins*, 13 Id. 202; *Crosby v. Wyatt*, 23 Id. 156. In *The Stafford Bank v. Crosby* and *Crosby v. Wyatt*, the court said, that a bank might agreeably to the prevailing usage in that part of the country, receive interest in advance without losing the right to insist on immediate payment if required by the surety, and that even if the effect was to suspend the debt, still a party who signed a note, knowing that it was to be discounted in bank, must be presumed to anticipate and acquiesce in all the consequences that would follow from his act in the usual course of things. The doctrine that the known and recognized course of business in a bank or other public institution, will be binding on those who deal with it, is sustained by the authorities. *Renner v. The Bank of Columbia*, 9 Wheaton, 588; *Mills v. The Bank of the United States*, 11 Id. 431; and may no doubt apply where a surety is in question.

It is obvious, however, that when the creditor's authority is derived from usage he must keep within it; *Conkendorfer v. Preston*, 4 Howard, 317; and in *Crosby v. Wyatt*, 10 New Hampshire, 318, the court said, that if the custom of banking authorized the collection of the principal by instalments, it did not sanction the extension of the whole debt, which was said to be the necessary consequence of taking interest by anticipation without receiving any portion of the principal.

A contract based on an illegal consideration, is void as between the parties, and cannot ordinarily be set up by third persons. An agreement to forbear in consideration of a promise to pay usurious interest is consequently invalid, both as it regards the principal and surety. *Wilson v. Langford*, 5 Humph. 320; *Halstead v. Brown*, 17 Indiana, 202; *Tudor v. Goodloe*, 1 B. Monroe, 322; *Anderson v. Marceau*, 7 Id. 217; *Duncan v. Reid*, 8 Id. 382; *Kyle v. Bostick*, 10 Alabama, 589; *Gilder v. Jeter*, 11 Id. 256; *Burgess v. Davey*, 33 Vermont, 616; *Brown v. Harness*, 16 Indiana, 248; *Draper v. Romney*, 18 Barb. 166; *Vilas v. Jones*, 10 Paige, 76, 1 Comstock, 274; *Williams v. Smith*, 48 Maine, 35; *Wiley v. Hight*, 39 Missouri, 130. It will make no difference that the creditor delays in the expectation of receiving the illegal interest, and that it is actually paid when the credit expires. *Pyle v. Clarke*, 3 B. Monroe, 262; *Scott v. Hall*, 6 Id. 285; *Gilder v. Jeter*. He is

under no legal obligation to forbear, and may be compelled to proceed forthwith at the instance of the surety. *Jones v. Brown*, 11 Ohio, N. S. 601, 609. It has been said, however, that when the usurious interest is paid in advance, the case is so far varied, that the parties to the illegal agreement cannot set up their own wrong as against the surety who is innocent. The illegal nature of the consideration will not, therefore, invalidate the implied agreement for forbearance, or prevent it from operating to discharge the surety. *Austin v. Dorwin*, 21 Vermont, 38; *The Bank v. Pearsons*, 30 Id. 711, 715; *Ferrell v. Boynton*, 23 Id. 142; *Miller v. McCann*, 7 Paige, 454; *Wheat v. Kendall*, 6 N. H. 304; *Kenningham v. Bedford*, 1 B. Monroe, 142; *Armstead v. Ward*, 2 Patton & Heath, 504; *LeFarge v. Herter*, 5 Selden, 234.

This distinction would, however, appear questionable, and has been denied. *Vilas v. Jones*, 10 Paige, 76, 1 Comstock, 274. The test is not whether the usury can be set up by the creditor against the surety, but whether the payment of usurious interest would be a sufficient answer to a bill filed by the surety to enforce the punctual payment of the debt, and for subrogation to the remedies of the creditor. Unless this question can be answered affirmatively, there is no such suspension as will discharge the surety. However this may be, it is clear that as the receipt of usurious interest before the debt matures, operates as a part payment in advance of principal, it will be a sufficient consideration for a new agreement, varying the old and liberating those who are answerable under it as sureties. *Austin v. Dorwin*, 21 Vermont, 38.

To render an executory agreement effectual as an alteration of a prior contract, it must be so far perfected by mutual promises, that an action would lie against the creditor for proceeding contrary to its terms. *Grover v. Hoppock*, 2 Dutcher, 291. A promise by the principal to give value, if the creditor will forbear, or by the creditor to forbear if the principal will pay interest, will not discharge the surety, although followed by indulgence and the payment of the stipulated consideration. *Leavitt v. Savage*, 16 Maine, 72; *Philpot v. Bryant*, 4 Bing. 717; *Reynolds v. Ward*, 5 Wend. 521. The reason is, that the hands of the creditor are not tied, and the surety may insist on the punctual fulfilment of the original agreement, *Walworth v. Brinker*, 11 Ohio, N. S. 592, 597. It is not enough that the creditor has acquired a right of action by forbearing, it must also appear that he would have been liable in damages for going on. *Gardner v. Watson*, 13 Illinois, 347; *Thornton v. Deuberry*, 13 Missouri, 559. "To make a contract for time," said Isham J., in *Wheeler v. Washburne*, 24 Vermont, 293, 295, "operate as a discharge of the surety, it must be sufficiently certain to bind the creditor to delay, as between him and the principal; something must have been done varying the legal and equitable liability of the principal, and entitling him to postpone the perform-

ance of the contract to a period more remote, than that fixed for its fulfilment. And if it wants any of those characteristics necessary to make it effectual as such, and render it legally binding, the surety will not be discharged. The test in all these cases is this: Could the agreement to delay have been enforced against the creditor, either as a defence to the note, or as a cause of action? If it could, the surety will be discharged, otherwise the agreement will be inoperative for that purpose; 2 Leading Cases in Equity, part 2, 535, 565, Am. ed.

In like manner the surety will not be discharged by a contract which is within the statute of frauds, and not reduced to writing; *Agee v. Steele*, 8 Alabama, 948; or which is essentially defective in any other particular. A parol agreement to vary a contract under seal will, accordingly be invalid between the parties, and as it regards the surety, unless sustained by the passage of a consideration, or so far executed that it would be specifically enforced by equity. *Steploe v. Haney*, 7 Leigh, 541; *Dovers v. Ross*, 10 Grattan, 252; *Davey v. Pendergrass*, 5 B. & Ald. 187; *Locke v. The U. S.*, 3 Mason, 446 (ante, 457). It would seem, moreover, that the surety will not be discharged by an alleged oral stipulation, contrary to the terms of the contract as reduced to writing, *Jones v. Brown*, 11 Ohio, N. S. 601; and, for a like reason the creditor cannot rely on a reservation of the right to proceed against the surety which is not contained in the deed, *Ex parte Glendenning*, Buck 517. It has indeed been said that the rule which excludes evidence, to vary or contradict a written instrument, does not apply to third persons, and that even when the new agreement is formally reduced to writing, the surety may show that it is subject to stipulations which are not set down. *Morse v. Huntington*, 40 Vermont, 488. The material question, however, is, whether the agreement for time could be enforced consistently with the rules of evidence against the creditor, because if it is not binding on him, it will not preclude the surety from requiring the debt to be paid when due. *Jones v. Brown*, 11 Ohio, N. S. 601. The principle is the same when a confession of judgment is accompanied with a stipulation for a stay of execution, which is not duly entered of record. *Walworth v. Burker*, 11 Ohio, N. S. 593. In determining whether a bond or mortgage or other security of a like nature is a suspension of, or merely collateral to an antecedent debt, the court will, however, look beyond the instrument to the intention with which it is delivered and received. The new security is not the agreement, but the consideration for that to which the parties agree. *Morse v. Huntington*, 40 Vermont, 488; *Ghan v. Niemcewicz*, 3 Paige, 314, 11 Wend. 312, 321; *Twopenny v. Young*, 3 B. & C. 208; *The U. S. v. Hodge*, 6 Howard. A promissory note, or bill of exchange, payable at a future day, however, implies an agreement for forbearance; *Baker v. Walker*, 14 M. & W. 465; and will therefore discharge the



sureties for the debt; although this inference is merely *prima facie*, and may be overcome by proof that the instrument was taken as collateral security; *Fox v. Parker*, 44 Barb. 541; *Wade v. Stanton*, 5 Howard, 531; *Ghan v. Niemcewicz*, 3 Paige, 314, 11 Wend. 312, 323; *Pring v. Clarkson*, 2 B. & C. 14; *Weakley v. Bell*, 9 Watts, 412; or with an implied reservation of the right to proceed against the surety. *Armistead v. Ward*, 2 Pat. & Heath 504; *Wyke v. Rogers*, 1 De G. M. & G. 408; 12 English Law & Equity, 112. In *Wyke v. Rogers*, Lord St. Leonards said that it had been contended in the course of the argument, that parol evidence could not be admitted to impeach the promissory note. That, however, was not the purpose for which the evidence was introduced; it was merely to prevent the collateral operation of that note, by showing that it was not intended to prevent proceedings on the bond, and thus to release the security. And as it appeared from the master's report, that there was an implied stipulation resulting from the general course of dealing, that the creditor should be free to proceed against the surety, he was not discharged (ante, 272).

Although an oral promise to pay that hereafter which is already due, is a *nudum pactum*, the rule is different where the promise is absolute and reduced to writing. It then becomes a promissory note, and the law will imply a consideration, in the shape of an agreement by the creditor to forbear until the instrument matures. The debt is, under these circumstances, actually suspended by force of the commercial law, or, to speak more accurately, there is a conditional payment of it, to be absolute if the note is paid when due. *Baker v. Walker*, 14 M. & W. 465 (ante, 276). Taking a note or bill payable at a future day, from the principal, without the consent of the surety, will consequently discharge the latter. *Barnett v. Reed*, 1 P. F. Smith, 190, 193; *Myers v. Welles*, 5 Hill, 463; *Fellows v. Prentiss*, 3 Denio, 572; *Okie v. Spencer*, 2 Wharton, 253; *Walters v. Swallow*, 6 Id. 446. In England and New York, this inference is held to be one of law (*Baker v. Walker*; *Fellows v. Prentiss*), although capable of being repelled by proof that the instrument was taken as a collateral security. *Pring v. Clarkson*, 2 B. & C. 14; *Gahn v. Niemcewicz*, 3 Paige, 614; 11 Wend. 312, § 18; *Williams v. Townsend*, 1 Bosworth, 411. It seems to have been supposed in *Gahn v. Niemcewicz*, 11 Wend. 312; that a note will not suspend the debt unless it is negotiable, but this distinction is not sustained by the authorities. In Pennsylvania, however, the question whether the note is satisfaction, conditional payment, or merely collateral, is one of fact for the jury, depending on intention. *Weakley v. Bell*, 9 Watts, 412; *Shaw v. The Church*, 3 Wright, 222; although these cases are not easily reconcilable with *Okie v. Spencer* and *Walters v. Mascall* (ante, 276, 278).

Taking a mortgage or bill of sale, conditioned for payment at a future date, is not a suspension of the debt, unless it is expressly so agreed. *Prima facie*, such an instrument is an additional or collateral security, and leaves the existing remedies of the creditor against both principal and surety intact. *The United States v. Hodge*, 6 Howard, 79. In like manner a bond or covenant by the principal, will not be a merger or satisfaction of the prior obligation, unless such is the understanding with which it was given and received. The question is one of intention, and as the mere circumstance that such an instrument is payable at a future day, will not imply an agreement to suspend the debt. *The United States v. Hodge*, so it may be shown by parol, that a bond or mortgage payable forthwith, was executed in consideration of a contract for forbearance. *Morse v. Huntington*, 40 Vermont, 488.

It follows, for a like reason, that an agreement which preserves the right of the creditor to proceed against the surety (*Boaler v. Mayor*, 19 C. B., N. S. 76), or the right of the surety to proceed against the principal, will not discharge the surety. *Runker v. Robinson*, 38 Missouri, 131. This is obvious where there is an express reservation of the surety's right to insist on immediate payment. *Price v. Barker*, 4 E. & Bl. 760; *Kearsley v. Cole*, 16 M. & W. 128; *Viele v. Hoag*, 24 Vermont, 46, and hardly less so when the creditor reserves the right to proceed against the surety, which necessarily implies a right on the part of the surety to enforce the punctual performance of the contract by the principal, or to perform it himself and proceed against the principal for indemnity. *Morse v. Huntington*, 40 Vermont, 488, 496. The contract is consequently not varied as to him, and there is no ground on which he can be discharged in equity. *Nichols v. Norris*, 3 B. & Ad. 41; *Hubbell v. Carpenter*, 1 Selden, 171; *Lyshart v. Philips*, 5 Denio, 106. "Sureties on a note are not discharged," said Isham, J., in *Viele v. Hoag*, "where time has been given, if there has been a reservation of the right to call for payment, or a right to proceed against the surety; 2 Leading Cases in Equity, part 2, 537, 3 American edition, in notes to *Rees v. Berrington*. The case of *Nichols v. Norris*, 3 Barn. & Ad. R. 41, was a deed of composition which the creditor signed and thereby agreed to extend the time of payment, and receive payment by instalments. But as he had expressly reserved his right to proceed at any time against the surety, the surety was held not to be discharged. In the case of *Melville v. Glendining*, 7 Taunt. R. 126, the plaintiff received bills of exchange from a defendant under an agreement that he should not be precluded from prosecuting while the bills were running. It was held, the surety was not thereby discharged. The same doctrine is sustained in the case of *Blackstone Bank v. Hill*, 10 Pick. R. 132; *Oxford Bank v. Lewis*, 8 Pick. R. 458; *Claggett v.*

*Salmon*, 5 Gill & John. 314; *Bangs v. Strong*, 10 Paige, 11; 2 Leading Cases in Equity, part 2, 537, 3 American edition, in notes to the case of *Reese v. Barrington*."

An executory contract is not binding unless the consideration is performed. When, therefore, an agreement for time depends on a stipulation on the part of the principal, which is broken before the payment of the debt could have been enforced, the surety will not be discharged. *Price v. Edmonds*, 10 B. & C. 78; *Hollier v. Eyre*, 1 Cl. & F. 1, 52; *Burtneil v. Samuel*, 3 Price, 251; *Vernon v. Turley*, 1 M. & W. 316; *Leavitt v. Savage*, 16 Maine, 72; *Paine v. The Bank of Natchez*, 6 Smedes & Marshall, 24. An agreement to extend a bond which is not yet due, if certain payments are made punctually during the interval, will, therefore, be invalid, both as it regards the principal and surety, unless the money is paid as agreed. *Harnsberger v. Geiger*, 2 Grattan, 144. Unless the new or substituted contract could be enforced between the parties, it cannot be set up as a defence by a third person. *Norris v. Cumming*, 2 Randolph, 323. When, however, the surety is discharged by an agreement for time, his liability is at an end, and it will not be revived by a subsequent default on either side.

The surety will not be discharged by variation of the contract which takes place with his assent; *Suydam v. Vance*, 2 McLean, 99; *Adams v. Way*, 32 Conn. 160; *Wright v. Stores*, 6 Bosworth, 606, 32 New York, 691; *Baldwin v. The Western Penna. Bank*, 5 Howard, 273; *Hunter v. Jett*, 4 Randolph, 104; and in pleading such defence, it is therefore necessary to aver the alteration took place without the assent of the surety. *Barker v. McClure*, 2 Blackford, 14; *The Bank v. Leavitt*, 2 Hammond, 207.

It will make no difference whether the authority under which the creditor acts is given at the time, or results from the terms of the original agreement; *Cooper v. Smith*, 4 M. & W. 569; *The Bank v. Beach*, 3 H. & C. 671; and in *Reddish v. Watson*, 5 Hammond, 510, a clause in a promissory note, that fifteen dollars should be paid as interest in advance, from every thirty days, during which the instrument remained unpaid after maturity, was held to authorize a renewal of the note from time to time, in accordance with the stipulation.

The authority, whenever given, must be strictly pursued. Assent to the renewal of a note, will not excuse a subsequent renewal without the knowledge of the surety; *Gray v. Brown*, 22 Alabama, 262; nor will an extension of the whole debt be justified by an authority to receive part, and give time for the payment of the residue. *Dundas v. Sterling*, 4 Barr, 73; *Crosby v. Wyatt*, 10 N. H. 318.

The assent may be expressed, as where the creditor is authorized to come to terms with the principal; *The Bank v. Beach*, 3 H. & C. 671, or implied from knowledge and acquiescence. *The New Hampshire*

*Bank v. Gill*, 16 N. H. 578. A surety will consequently not be discharged by the renewal of a note which he signed, knowing that it would be left for discount at a bank where such was the established course at business. *The Bank v. Hill*, 10 Pick. 129; *The Bank v. Rollins*, 13 Maine, 202 (ante, 479). But the burden of proof is, under these circumstances, on the creditor, and it must appear not only that he acted in accordance with a local custom or habitual mode of dealing, but that the surety was cognizant of it when he incurred the liability. *Comb. v. Wolf*; *Howell v. Jones*, M. & R. 97; *Crosby v. Wyatt*, 10 New Hamp. 318.

It has been held that when the effect of the agreement is absolutely to discharge the principal, a reservation of the right to proceed against the surety is repugnant and illusory, and cannot be enforced. *Webb v. Hewett*, 3 Kay & J. 438. When, however, the surety agrees in the first instance, or subsequently, that the creditor may compound with or release the principal without exonerating him, the principal may be discharged without losing the right to proceed against the surety, and it will be immaterial whether the release of the principal is in consideration of part payment, or merely voluntary. *Cowper v. Smith*, 4 M. & W. 519; *The Bank v. Beech*, 3 H. & C. 671.

It is well settled, that a surety who has been discharged by time given to the principal, will be bound by a new promise, which may be viewed as a waiver or ratification. In either aspect, it relates back to the original transaction, and does not require the aid of a new consideration. *Smith v. Winter*, 4 M. & W. 454; *Fowler v. Brooks*, 13 New Hampshire, 241; *Woodman v. Eastman*, 10 Id. 359; *The Bank v. Johnson*, 9 Alabama, 622; *Thornton v. Wynn*, 12 Wheaton, 183; *Cremer v. Perry*, 17 Pick. 332; *Morgan v. Peet*, 32 Illinois, 281; *Hinds v. Ingham*, 31 Id. 400. "When," said Lord Eldon, in *Mayhew v. Cricket*, 2 Swanston, 193, "a surety who has been discharged by the laches of the creditor, makes a promise to pay, he cannot object to that as a promise without consideration. The promise is valid not as the consideration of a new, but the revival of an old debt." This is in entire accordance with the authorities which establish that a debt barred by the statute of limitations, or a certificate of bankruptcy, may be revived without a new consideration, and that a promise by an endorser will operate as a waiver of a want of notice (ante, 193). Byles on Bills, 236, 6 ed.; *Tebbits v. Dowd*, 23 Wend. 379; *Martin v. Ingersoll*, 8 Pick. 1; *Creamer v. Perry*, 17 Id. 582. The point was decided the other way in *Walters v. Swallow*, 6 Wharton, 446, on grounds which hardly seem sufficient.

To render such a promise valid, it must, however, appear by some sufficient means of proof, that the surety knew the facts and circumstances which constitute the defence, *Wayman v. Hoag*, 14 Barbour, 222; *Farrington v. Brown*, 7 New Hampshire, 271; *The New Hamp-*

*shire Savings Bank v. Colcord*, 15 Id. 119; *Tebbits v. Dowd*, 23 Wend. 379; *Jones v. Savage*, 6 Id. 658; *Trimble v. Thorn*, 16 Johnson, 152; *Sparhawk v. The Union Bank*, 4 Humphreys, 336; although if this be shown, his knowledge of the legal consequence will be presumed. *Morgan v. Peel*. A contract upon a new and valuable consideration, or in consideration merely of forbearance, is, however, it seems, binding whether the promisor does or does not know that he is discharged.

Any departure from, or violation of the terms of the contract which is injurious to the surety, will discharge him in equity although the breach may not be a defence at law. A payment to one of several contractors in advance of the time fixed by the agreement, will ordinarily fix rather than dissolve the obligation of the others, but the effect may be different when the payment is made to a principal without the knowledge or consent of the surety. In *Calvert v. The London Dock Co.* 2 Kean, 638, it had been agreed between the parties, that three-fourths of the value of the work was to be paid as it went on, and the remaining one-fourth kept back until the completion of the job, and the payment of the whole in advance was held to discharge the sureties who had agreed to be answerable for the faithful performance of the contract, by depriving them of a fund which would have gone in mitigation of the damages occasioned by the default of the principal. So when the owner fails to keep the principal contractor insured, in accordance with the agreement, and the latter is disabled by a fire from going on, a recovery cannot be had against the surety (ante, 399). *Watts v. Shuttleworth*, 5 H. & N. 235.

It is equally well settled, that the creditor is bound to give the surety the benefit of all the securities and remedies for the debt, or that can be made available as a means of payment; and if these are lost or impaired through his negligence, or diverted to any other purpose, the surety will be discharged. *Newton v. Charlton*, 10 Hare, 651, 2 Drew, 333; *Pearl v. Deacon*, 24 Beavan, 186; *Hurd v. Spencer*, 40 Vermont, 518; *Watts v. Shuttleworth*, 5 H. & N. 235.

This equity does not depend on the contract with the creditor, but on the peculiar relation of the surety to the principal, and the duty of the creditor so to exercise his rights as not to prejudice the other parties to the contract unnecessarily. *Haythorne v. Swinburn*, 14 Vesey, 164. It may, therefore, arise from the loss of a security of which the surety was ignorant; *Watts v. Shuttleworth*; *Paul v. Deacon*; and which did not exist under the contract as originally made. *Baker v. Briggs*, 8 Pick. ; *Stewart v. Davis*, 18 Indiana, 74; *Luke v. Bratton*, 2 Jurist, N. S. 839. In *Newton v. Charlton*, the creditor was indeed held not to be responsible for parting with a security acquired subsequently to the obligation of the surety, but this decision was disapproved in

*Luke v. Bratton*, and would seem contrary to the principle upon which the equity of the surety rests. *Baker v. Briggs*, *Stewart v. Davis*.

Entire good faith is due to the surety, and if a fact be industriously concealed from him, or wilfully misrepresented, which, though not material to the contract with the creditor, tends to lessen the chance of obtaining indemnity from the principal, the surety will be released from obligation. *Allen v. Hamilton*, 6 Beavan, 148; *Ward v. Bentley*, 6 Hill, 56.

In *Peacock v. Bishop*, 3 B. & C. 605, the defendant had guaranteed the payment of iron sold by the plaintiffs, and it appeared from the evidence given at the trial that the price nominally fixed for the iron was much above the market value, and that the excess was, by a private arrangement with the purchaser to go in liquidation of an antecedent debt. The concealment of these facts was held to be a fraud, which invalidated the guaranty. They were obviously material as rendering the contract less advantageous to the principal than it appeared, and diminishing the means and probability of payment. A similar decision was made in *Stone v. Compton*, 5 Bing. N. C. 142, where the recitals of the various instruments read at the execution of the note, were so worded as to convey the impression that the principal would actually receive the whole amount, whereas a considerable portion of it was to be retained on account of an antecedent debt. The jury found a verdict for the defendant on this evidence, which was sustained by the court in banc, notwithstanding the objection that the defendant, who had signed the instrument as a principal, could not make a defence resting on an obligation that he was a surety. A surety will in like manner be discharged by the fraudulent suppression of the existence of a prior mortgage, which renders the mortgage given by the principal an inadequate security for the debt. *The Lancaster Bank v. Albright*, 9 Harris, 228.

The position of the surety was likened by Lord Cottonham, in *Owen v. Homan*, 3 Macu & G. 378, 4 H. L. Cases, 997, to that of insurer, and it was said that every material circumstance should be stated with the utmost frankness. The weight of authority would, however, seem to be that if the relation of surety to the principal is one of trust and confidence, he has no such claim on the creditor, and can ask for nothing more than the good faith which is essential to every contract. *The Bank of Newbury v. Richards*, 35 Vermont, 281; *Hamilton v. Watson*, 12 Cl. & F. 109; *Samuel v. Matthews*, 16 Missouri, 332. They deal with each other at arms length, and the creditor is not bound to anticipate inquiry by disclosure unless the circumstances are such that silence is in effect concealment. *The North Ins. Co. v. Lloyd*, 10 Ex. 523. It is for the surety and not for the creditor to determine whether the contract is a wise one, and Lord Campbell said, in *Hamil-*

*ton v. Watson*, that if the latter was bound to communicate all that it might be material for the former to know, no banker could be safe in taking a guaranty, and there would be an end to transactions on the credit of third persons. The peculiarity of the contract of suretyship is not so much in requiring a larger measure of good faith, as that a concealment or representation may be injurious and fraudulent in the case of a surety, which would be immaterial if he were a principal.

Although silence is not ordinarily concealment, it may be so under peculiar circumstances, as where one of the parties to a contract knows that the other is proceeding in ignorance of a material fact which is exclusively within his own knowledge, and it will then be his duty to be as full and explicit on that head as if he had been interrogated.

It is accordingly established, on the authority of Lord Eldon, that, "if a principal, suspecting the fidelity of his agent, requires security in a way to indicate that he believes him to be trustworthy, and a third person becomes answerable under these circumstances, the contract will be void." *Smith v. The Bank of Scotland*, 1 Dow, Parl. Cases, 272, 291; *Haynes v. Maltby*, Ib. 278; *The Franklin Bank v. Stearns* 39 Maine, 533, 541; *The Franklin Bank v. Cooper*, 37 Id. 542, 39 Id. 542. In *Haynes v. Maltby*, the surety was held to be exonerated from the liability which he had assumed for the good conduct of an agent, by the failure of the employer to inform him that the principal was in default when the bond was executed. A man who becomes answerable for another is entitled to suppose that the transaction is in the usual course of business, and will not subject him to extraordinary risks that could not be anticipated. To accept a surety knowing that there are unusual circumstances that increase the risk, and of which he is ignorant, is, therefore, a legal fraud, and the surety is not bound. The bond of a cashier, drawn to cover past as well as future defalcations, will accordingly be invalid as it regards a surety whose signature is procured at the instance of the directors, with a knowledge on their part that there have been defalcations which are concealed from the surety. *The Franklin Bank v. Cooper*, 37 Maine, 542.

It is not a sufficient answer that the surety did not call upon or make inquiries of the representatives of the bank, because they might have called upon him or disclosed the truth by letter. *The Franklin Bank v. Cooper*, 37 Maine, 542. The court relied on the doctrine enunciated by Lord Cottonham, that a surety is so far an insurer as to entitle him to require that everything which is so exceptional or peculiar that it could not be anticipated shall be made known. This case does not, however, transcend the general principle that a *suppressio veri* may equally with an *allegatio falsi* amount to fraud. In *Etting v. The Bank of the United States*, 11 Wheaton, 59, a similar question was decided in favor of the creditor by a divided court.

It cannot, however, be a duty to communicate that which is already known. The surety may reasonably be supposed to be acquainted with every material fact that can be ascertained by the exercise of ordinary care and diligence, and certainly ought not to be ignorant of the character and situation of the principal. It is accordingly no defence to a suit against the sureties, on the official bond of the treasurer of a corporation, that he was insolvent when re-elected, and that there was a balance against him from the previous year, which was not divulged at the execution of the bond. *Beyerle v. Hain*, 11 P. F. Smith, 231.

"It must be presumed," said Agnew, J., in delivering judgment, "that the sureties knew that the treasurer was insolvent when they executed the bond, as the contrary is not alleged or offered to be shown. His insolvency might be a good reason for the plaintiffs' demanding security, if the by-laws of the encampment had not required it, but it cannot possibly relieve the defendants from the liability they incurred in becoming his sureties. The plaintiffs were under no legal or moral obligation to inform them of the amount with which he stood charged on the treasurer's book, unless they were asked. It was no more their duty to inform the defendants of the amount in his hands when the bond was given, than it was to inform them of the amount that would probably come into his hands during the year for which he was chosen. It is not alleged that they became the sureties of the treasurer at the instance or solicitation of the plaintiffs, or that the plaintiffs knew that they were to be his sureties, until the bond was presented for their approval. If the defendants had offered to show that the treasurer was an insolvent defaulter,—that he had embezzled the moneys which he had received the previous year—and that he did not have the amount in his hands which he stood charged with on the treasurer's book when the bond was given; and that these facts were not known by them when they became his sureties, but were known by the plaintiffs, the offer might have been relevant, and, if proved, have constituted a good defence to the action. But it was no part of the offer to show that the treasurer had not the funds in his hands with which he was charged on the book, nor was any fact offered to be shown, from which such an inference could be fairly drawn. If he was actually insolvent, it does not follow that he had been guilty of embezzlement, nor would evidence of insolvency warrant the inference that he had appropriated the funds of the encampment to his own use. In the absence of any evidence tending to show that he had used the funds for an improper purpose, the presumption is that they were in his hand when the bond was given."

A promise to look solely to the creditor, or a promise to proceed forthwith against him, is, when standing alone, a *nudum pactum* that



can have no effect on the obligation of the surety. And this is equally true of an allegation that the debt has been paid and that the surety will have no further trouble. When, however, the surety is induced by such an assurance to surrender the securities which he has received from the principal, or to forego any means of indemnity or protection, an estoppel will arise to the extent of the resulting loss. The rule was laid down in *Baker v. Briggs*, 8 Pick. 128, and again in *Harris v. Brooks and Carpenter v. King* (ante, 428), and has been applied in several other instances. *The Bank v. Klingensmith*, 7 Watts, 523; *Hickok v. The Bank*, 35 Vermont, 476; *Wilson v. Green*, 25 Id. 450.

It was said in *Carpenter v. King* (ante), that although the debt be not paid, and the allegation that it is, proceeds from error and not from an intention to deceive, it is still a mistake for which the creditor is responsible, and he shall bear the loss rather than allow it to fall on the person whom he has unintentionally misled.

In *Kingsley v. Vernon*, 4 Sandford, 361, an allegation that a bill of exchange had been paid by which the endorser was led to suspend proceedings until the acceptor became insolvent, was in like manner held to discharge the drawer, whether it was made fraudulently or in good faith. It would seem, however, that an honest expression of belief will not work an estoppel under these or any other circumstances, and such is the general current of decision. *Wilson v. Green*, 25 Vermont, 450; see 2 Smith's Leading Cases, 746, 6 Am. ed.

The gist of such a defence is the injury inflicted on the surety, and he will not be exonerated unless this is established with sufficient clearness. *Hageboom v. Herrick*, 4 Vermont, 131. When, however, the surety delayed taking measures for his own protection, in reliance on a promise by the creditor to collect the debt when due, which remained unfulfilled for more than a year and until the principal became insolvent, the court held that there was a sufficient presumption of injury to preclude the creditor. *Hickok v. The Bank; Kinsley v. Vernon*, 4 Sandford, 361.

It has been said that the creditor is entitled to the benefit of the securities held by the surety, and this is no doubt so far true that the latter cannot claim to be discharged on equitable grounds without surrendering all the assets which he has received from the principal. *Aldrich v. Martin*, 4 Rhode Island, 520; *Moses v. Murgatroyd*, 1 Johnson Ch. 119; *Curtis v. Tyler*, 9 Paige, 432; *Chilton v. Robbins*, 4 Alabama, 223; *Eastman v. Foster*, 8 Metcalf, 19; *Bibb v. Morton*, 14 Smedes & Marshall, 37; *Vail v. Foster*, 4 Comstock, 312; *Moore v. Payne*, 12 Wend. 137; *Smith v. Steele*, 25 Vermont, 427.

He who seeks equity must do it, and the surety obviously cannot complain of an injury done by the creditor, while guilty of a similar wrong, by withholding means that might be made effectual for the

payment of the debt. The equity of the surety may, therefore, be rebutted by proof that he is in possession of sufficient money or assets to meet the obligation on which he is sued. *Moore v. Payne*, 12 Wend. 137; *Chilton v. Robbins*; *Smith v. Steele*.

It has, however, been held that an agreement for forbearance will discharge the surety, notwithstanding a mortgage or confession of judgment to the latter from the principal; *Myers v. Wells*, 5 Hill, 436; because the creditor cannot do that indirectly, which he has promised not to do in his own person, and the remedy for the debt is as much delayed as if it were not secured. It would seem, however, that the creditor is entitled, under these circumstances, to an assignment of the judgment, to be enforced when the stipulated indulgence has expired.

#### REVOCATION OF WILLS.

LAWSON, APPELLANT, *versus* MORRISON ET AL., APPELLEES.

In the High Court of Errors and Appeals of Pennsylvania.

JULY SESSION, 1792.

[REPORTED, 2 DALLAS, 286-290.]

*To make the execution of a subsequent will, a revocation of one of a prior date, the second must be shown, or must appear to be inconsistent with the first. Where the second will cannot be found, and its contents are not known, proof of its execution and existence will not raise a presumption of the revocation of the first.*

*The cancellation or destruction of a revoking will, is, prima facie, a revival of that which it revokes.*

*The cancellation of a will, in the possession of the testator, will be referred to his own act or direction, in the absence of evidence, that it was the result of wrong, or of the act of a stranger.*

APPEAL from a sentence of the Register of Wills, &c., and two justices of the Common Pleas for the county of Cumberland. The case had been argued in July, 1789 (before the present organization of the judiciary department under the existing Constitution), and afterwards, in October, 1792, by *Bradford* and *Ingersoll*, for the appellant, and by *Lewis* for the appellees.

The facts, on which the appeal arose, were as follow: A written paper, purporting to be the will of Janet Morrison, dated on the 19th of October, 1775, was exhibited for probate to the Register of Wills, &c., on the 19th of October, 1786. A caveat was entered by the appellant against admitting it to be proved, alleging that the testatrix had made a *later* will, which expressly *revoked* the former will; and that the latter will had not been cancelled, nor destroyed, although it could not be found after her death. The will of October, 1775, was, however, established by the sentence of the Register's Court; from which sentence the present appeal was brought; and new evidence given in this court.

On the record and evidence, it appeared that Janet Morrison had a will written before this of 1775, by Oliver Anderson, which former will was duly executed. The same scrivener wrote this will. He afterwards wrote another will, in 1777, and a fourth will about the latter end of the year 1779. The testatrix destroyed the first will, when the will of 1775 was executed, and also that of 1777, when she executed the will of 1779. In the last will, the scrivener (who was a witness) *believes* there were words revoking all former wills, and that he had usually inserted such a clause in all the wills he wrote; and John Ray, a subscribing witness to the will of 1779, swears, that, when it was executed, the testatrix *declared* it to be her last will, and that she revoked all former wills. The legatees were generally the same, in the wills of 1775 and 1779; but the legacies were larger in the last, on account of the then depreciated state of the paper bills of credit emitted by Congress. The will of 1779 had been delivered to the testatrix about ten days before her death, by a Mrs. Liun, whom she had sent for it, to Oliver Anderson, who then had both wills in his custody; but the will of 1779 had not been seen afterwards. James Lawson, the appellant, is the eldest son of James Lawson, an only brother of the testatrix, who had no sister; but her brother had two other sons, named Thomas and Francis, and no other descendants. The testatrix had induced her nephew, James, to come from Ireland to Pennsylvania, with his family, some years before her death, and about a week before that event, received them, with their effects, into her house, and a few days after she had obtained the will of 1779 from Oliver Anderson. For some weeks before her death, she expressed great kindness for the appellant, and frequently said, "all her estate must be his." But when the will of 1779 was executed, the one of 1775

was not cancelled; because the testatrix was then out of humor with the appellant, and she was afraid lest the will of 1779 might get into his hands, or be lost; and, in such case, she desired Oliver Anderson to produce the will of 1775, as he has deposed.

Upon this statement the question arose,—whether the will of 1779 (whose contents did not appear, but from the deposition of Oliver Anderson) was a revocation of the will of 1775.

For the appellant, two propositions were stated, and the corresponding authorities cited: 1st. That the will of 1777, was a revocation of the will of 1775, in act, as well as intention, either of which is sufficient. Moore, 177; 3 Mod. 260; Dy. 153; Off. of Ex. 20; Swinb. 15, 525; Cowp. 90; God. Orph. Leg. 51, 54; Cro. I. 115; 1 Roll. Abr. 614; 2 Eq. Abr. 771. 2d. That the mere cancelling of a latter will, much less the mislaying or loss of a latter will, is not a revival of a former will: the cancelling may be done with a view to die intestate; and the mislaying may be accidental; and the will of 1777, being in writing, can only, by the act of Assembly, be annulled in writing. 3 Atk. 799; Doug. 36; Cowp. 49; 1 P. Wm. 343, 345; 4 Burr. 2513; Loft. 465, 470; Pow. Dev. 534, 535; 1 vol. Pren. L. (Dall. edit.) p. 53, sects. 2, 6.

*For the appellee*, the case was considered in various points of view. 1st. Does the law of Pennsylvania permit the *revocation* of a will by *parol*, or must it be *in writing*? The act of Assembly declares that it shall be in writing. 1 vol. Dall. edit. p. 55, s. 2, 6. In England, it is true, a will might have been altered by *parol*; but it must have been express, not intentional, in the present, and not in the future, tense. God. Orph. Leg. 51, 54; Swinb. 531; Cro. I. 115. The evidence here is not positive; it is mere supposition, that the will of 1777, in express terms revoked all former wills. 2d. Is the act of making a subsequent will (even where its contents are unknown) sufficient in itself, as a revocation of a former will? The authorities directly disaffirm the position, where the subsequent will does not alter the *whole* disposition of the estate; and if the same solemnities are necessary to *revoke*, which are required to *make* a will, there is not, in the present cases, proof by two witnesses of the contents of the will of 1777. Besides, the paper called a subsequent will, does not appear to be more than a codicil, as it is not proved that any executors were constituted; and both might, therefore, stand together. There is no proof that the latter will disposed of the personal estate differently, but only that it increased the legacies. Perk. 179; God. Orph. Leg.

53, 12, 3; Cro. E. 721; Pow. Dev. 538; Swinb. 532; Cro. E. 721; Cro. Car. 23, 4; 1 Show. 534, 537; Salk. 592; Sho. P. C. 149; Hardr. 375; Cowp. 87, 8; 3 Wil. 497; 2 Bl. Rep. 937, S. C. 3dly. Does the destruction of the latter, revive the former will? The intention of the party is undoubtedly material upon this question. The testatrix sent for the will; but whether she cancelled it, with a view to die intestate, or James Lawson destroyed it, with a view to claim the whole estate as heir-at-law, can only be explained by the circumstances; and there is one circumstance which is strong indeed, to show that she never meant to give him the whole; namely, that James Lawson had arrived in Cumberland county before the making of the latest will, and yet she therein bequeathed to other persons, legacies to a considerable amount. The cancelling of a latter will, under circumstances less forcible, has been deemed the revival of a former one. 4 Burr. 2512. 4thly. Is there any difference between the revocation of a will in Pennsylvania, and in England, since the statute of frauds and perjuries? The doctrine in the act of Assembly (1 vol. Dall. edit. p. 640), is the same as the doctrine in the statute, 29 Car. 2, c. 3, and the effect should be equally uniform.

*For the appellant*, in reply. All the cases cited by the opposite counsel, relate to *real* estate in England, subsequent to the statute of frauds and perjuries. But our position is, that a subsequent will, or testament, does, of itself, revoke all prior wills of *personal* estate. A latter *testament*, says Swinb. 15, always infringes a former one; but a *codicil* is different; and the distinction between a testament and will is established in Cowp. 90. The present will was not found (nor was any other will found) in the possession of the testatrix; and the presumption, therefore, is, that she cancelled the will of 1777, with an intention to die intestate.

CHEW, President, delivered his opinion, in general terms, in affirmation of the sentence of the Register's Court.

McKEAN, Chief Justice. There has been no case or precedent cited, which comes up to this, in all its parts; but there are several cases, which depend upon the same principle.

Before the statute of 29 Car. 2, ch. 3, wills in England might be revoked by any express words, without writing; and so it was in Pennsylvania, until altered by positive law; but in England since that statute, and in Pennsylvania, since the act of Assembly,

of the 4th of Anne, "concerning the probates of written and nuncupative wills, and for confirming devises of lands," wills of *lands* must be revoked by writing, accompanied with solemnities similar to those necessary for making the wills. Here, latter wills of lands, or a writing, revoking a former will, must be proved by two or more credible witnesses; and no *testament*, or will in writing, for *personal estate*, can be revoked by *words*, except the same be committed to writing and read to the testator, is allowed by him, and proved by two witnesses at least. Besides these *actual* revocations, there are other acts of the testator, which have always been considered as revocations, because *contrary* to, or *inconsistent* with, the will, and evidencing an alteration or intention; as a deed in fee; or a lease for years to the same devisee, to commence after the testator's death; a subsequent marriage and birth of a child; cancelling, obliterating or destroying the will, and such like. These are termed, "*implied, constructive, or legal* revocations," and still subsist as they were before the act of Assembly, or the statute of frauds. Cro. I. 49; Carth. 81. But all presumptive revocations may be encountered by evidence, and rebutted by other circumstances. Cowp. 53; Doug. 37.

It has been often determined, that a will, revoked by a subsequent will, but not cancelled, was re-established by the cancellation of the subsequent will. 1 Show. 537; Show. P. C. 146; 1 Will. 345; 2 Vern. 741; S. C., Prec. Chan. 459; S. C., 4 Burr. 2512; Cowp. 86, 92; Doug. 40; 2 Blackst. 937; 3 Mod. 204; Salk. 592; 3 Mod.

There are, however, some particular circumstances, in this case, besides the general question.

It appears, that the appellant had lived in the neighborhood of the testatrix when she made the will of 1779; that the legatees in that will were chiefly the same as in the present, but some legacies were larger, on account of the money being then depreciated, and that Oliver Anderson was expressly requested by the testatrix to take care of the will of 1775, lest the last should get into the hands of the appellant, or be lost. On the other hand, it does not appear what became of the will of 1779, after it was sent and delivered to the testatrix; whether it was destroyed by her, or any other person,—but it cannot be found. It does not appear, wherein the will of 1779 differed from the present one, nor what alteration was thereby made in particular, only that there were partial alterations, and there were no executors named in it.

In this view of the case, I am of opinion, that the mere circumstances of making the will of 1779, is not *virtually* a revocation of the former, the contents being *unknown*, and it not appearing to have been in *esse* at her death, but rather the contrary, and that she had cancelled or destroyed it. No other person was interested in its destruction, from anything I can discover, except the appellant, or his brothers, who were not in America; and charity will induce a presumption, that she herself destroyed it. If this is the fact, the first will is not thereby revoked, as neither could be *complete* wills, until the death of the testatrix, and her destroying it had the same effect as if it had never existed, unless it had been clearly proved, that she did it with the intention to die intestate. Should a contrary opinion hold, to wit, that the first will was revoked, at the *instant* the second was executed, yet the cancelling of the second by the testatrix herself is a revival of the first, if undestroyed. Cowp. 92; Harwood v. Goodright.

Here is a good *subsisting* will properly attested: There is no way to defeat it, but by proving it was revoked by another will, *subsisting* at the death of the testatrix, or that she cancelled the latter will, so revoking all former ones, with a mind to die intestate. And as the appellant has failed in such proof, I concur with the president, that the will of 1775 must stand; and that the sentence of the Register's Court be affirmed, with double costs.

*The Court* concurring, the sentence of the Register's Court was, accordingly, affirmed, with double costs.\*

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A will, unlike most instruments, operating *inter viros*, does not confer a present right of any kind. It is not a contract, the union of two minds in a common purpose which cannot be rescinded without the consent of both. Like a deed before delivery, or a power of attorney, it is the expression of a purpose that has not yet gone into effect. It is, in short, the will of the testator, a transcript of his mind, to fall if that varies, to stand if it remains the same. On general principles, therefore, aside from the statutes by which the subject is now regulated, a will may be revoked by any act or declaration indica-

\* See Boudinot's *Ex'or v. Bradford*, 2 Dallas, 266.

ting that the disposing purpose of the testator has undergone a change. The way in which the intention is expressed, is immaterial, if it appears with sufficient clearness; it need not be expressed in terms, but may be deduced inferentially from circumstances.

The expression of a wish that the will should not stand, Rolle, Abridg. Devise, 140; *Card v. Grinman*, 5 Conn. 164; an attempt to destroy it, although not successful, *Doe v. Harris*, 8 A. & E. 1, 11; *Smiley v. Gamble*, 2 Head. 164; a direction that it should be destroyed, which is not fulfilled; *Walcott v. Ochterlony*, 3 Curteis, 380; *Ford v. Ford*, 7 Humphreys, 104; and even an invalid nuncupative gift of the land to another; Rolle, Abridg. P. pl. 7; are, where no statutory prohibitive intervenes, enough to set aside the most formally executed testament. *Clark's Ex'rs v. Ebern*, 1 N. C. Law Repository. So far does this doctrine extend, that the destruction of an antecedent will under an erroneous impression that it was one of later date, might, when coupled with a declaration of the testator's wish to destroy the second and preserve the first, operate as a revival of the instrument which was destroyed, and a revocation of that which was preserved. *Smiley v. Gamble*, 2 Head. 164; *Burns v. Burns*, 4 S. & R. 295.

It has been said, that when the statute law requires a will to be by writing executed in due form, an oral revocation must necessarily be inoperative and void. *Mace v. Mace*, 2 Head. 164. But this conclusion is not warranted by the premises, and was expressly denied in *Doe v. Harris*, 8 A. & E. 1, 11. The maxim that the obligation of contracts must be dissolved in the same manner that it was formed, is not applicable to an instrument which is a mere expression of a design to confer a benefit in a contingency that has not yet arrived, and is as much under the control of the testator after it has been duly published and attested, as it was before. A change of purpose on his part, may disappoint expectations, but can injure no one, and there can be no right to require that it should be manifested in one form rather than another.

The effect of this course of decision was to leave the revocation of wills open to the whole range of parol evidence, with the risk that a purpose which the testator had deliberately expressed in writing, might be defeated by a false or mistaken interpretation of his language. The sixth section of the 29th Ch. 2, commonly known as the statute of frauds, accordingly declared that, "no will of lands should be revoked save by another will duly executed, or by some writing signed in the presence of three witnesses, or by burning, tearing, cancelling, or obliterating the will by the testator himself, or in his presence and by his directions." Another section of the same statute provides in substance that, "no will in writing of goods, chattels, or personal estate, shall be repealed or changed by any words, or by word of mouth only, unless the



same be committed to writing and read to the testator, and allowed by him, and proved to have been so done by three witnesses." Under these provisions a will cannot be revoked by word of mouth, whether it relates to land or chattels, but the restriction on the acts by which a revocation may be affected, applies only to estates of freehold. This distinction was abrogated in England by the 1 Victoria, C. 26, and has also been done away with throughout the greater part of the United States.

The subject is regulated by laws in many parts of this country, which extend the provisions of the statute of frauds by requiring that all wills, either of real or personal estate, shall be revoked by tearing, burning, cancelling or obliteration, or by a writing executed in the same manner as the will. This rule prevails in New York, Pennsylvania, New Jersey, Maryland, Kentucky, Mississippi, and generally in the New England States; although in Pennsylvania, a will of personalty may be revoked by an oral declaration of the testator during his last illness, reduced to writing and read over, and allowed by him in the presence of two witnesses. In Tennessee, the common law is still unchanged, and a will may be revoked by any act manifesting such design. *Smiley v. Gamble*, 2 Head, 164.

In enumerating the means by which a will might be revoked, the intention of the Legislature was to exclude others, and not to vary the operation of those which were designated. Hence the burning, tearing, cancelling or obliteration of a will, depends for its effect as it did before the statute, upon the natural inference, that such a course would not be pursued, if the intention was that the will should stand. *Elms v. Elms*, 1 Swaby and Tristram, 155. When, therefore, a testamentary writing is destroyed or cancelled, the burden of proof devolves on those who maintain the validity of the instrument, and a revocation will be presumed, unless they can show that the testator acted with a different purpose. *Moore v. Moore*, 1 Phillimore, 375. The intention is, however, everything, the manual act nothing except as evidence of intention, and the inference in favor of revocation may be repelled by proof that such was not the design. "If," said Lord Mansfield, in *Burtinshaw v. Gilbert*, 1 Cowper, 49, "a man were to throw the ink upon his will, instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling; or, suppose a man, having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the last will; or, suppose a man, having a will, consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, that must govern in such cases."

It is well established, in accordance with this principle, that what was said and done at the time may be received as evidence of the intent and meaning of the testator, and that if it appears from this or any other admissible means of proof, that the instrument was cancelled through mistake or accident, or without a formed and accomplished design, there will be no revocation. *Elms v. Elms*, 1 Swaby & Tristram, 155; *Doe v. Perkes*, 5 B. & Ald. 498. In *Doe v. Perkes*, the testator tore the will through, in a sudden fit of passion, but was induced to desist by the representations of the bystanders, and the submission of the person who had given the offence. He then fitted the pieces together, and having found that no material word had been obliterated, said that it was well that it was no worse. Under these circumstances, it was left to the jury to determine, whether the act of cancellation was complete. They found that it was not, and that the testator intended, before he was stopped, to do more to carry his purpose into effect. The verdict was sustained, on a motion for a new trial. A similar decision was made in *Elms v. Elms*.

In like manner, where various alterations and erasures were made in an existing will, as a guide for the attorney who had been employed to draft a new one, which the testator was prevented from executing by death, the court held that there was no revocation, even of the clauses which were struck out, because the change was made as a means to an unaccomplished end. *Means v. Moore*, Harper, 314, 3 McCord, 282. So where a testator, having two wills of different dates in his hand, threw one of them into the fire, his acts and declarations were received to show that his intention was to burn the other, and that the first was not revoked. *Burns v. Burns*, 4 S. & R. 295; *Smiley v. Gamble*, 2 Head, 164.

But although the language accompanying an act may be received as part of the *res gestæ* to show the intention with which the act was done; *Flintham v. Bradford*, 10 Barr, 82; *Doe v. Palmer*, 16 Q. B. 747; subsequent declarations do not fall within this rule, and are excluded by the provisions of the statute of frauds. They may be evidence of the mental condition of the testator, that he had, or had not a sound disposing mind, but they should not be allowed to weigh in the determination of the main issue whether he designed to revoke the will. *Doe v. Palmer*; *Flintham v. Bradford*; *Boves v. Reed*, 5 Bing. 435; *Mars-ton v. Rowe*, 8 A. & E. 14; *Waterman v. Whitney*, 1 Kernan, 51; *Dean v. Brown*, 4 Cowen, 483; *Jackson v. Betts*, 6 Id. 377, 6 Wend. 173; *Clingan v. Micheltree*, 7 Casey, 8; *Moritz v. Brough*, 16 S. & R. 403; *Boylan v. Meeker*, 4 Dutcher, 274; *Comstock v. Badlyne*, 8 Conn. 254.

It has, notwithstanding, been held, that when a will is missing at the death of the testator, or is found in a mutilated condition, his decla-

rations will be admissible to strengthen or rebut the inference that it was cancelled or destroyed by him; *Lawyer v. Smith*, 8 Michigan, 411; *Durant v. Atkinson*, 2 Richardson, 183; and the opinion delivered in the Court of Appeals by Chan. Walworth, in *Jackson v. Betts*, tends in the same direction. The question, under these circumstances, is one of custody; whether the testator kept the paper by him as containing his last wishes with regard to the disposition of his estate. If he did, the presumption that it was destroyed by him is repelled, and it becomes necessary to ascribe the disappearance or mutilation of the instrument to other causes.

There are three principal ways in which a revocation may be effected under the provision of the statute of frauds; 1st; by burning; 2d; by tearing, cancelling, or obliteration, and 3d; by a writing executed as the statute requires. Burning is an act so unequivocal in its character, as to carry with it a presumption of revocation, which can only be repelled by showing that the intention was to destroy some other instrument, and not that actually consumed. A writing which is burnt, ceases to exist for every purpose, and, therefore, cannot operate as a will. It is not necessary that the whole instrument should be consumed, if the fire destroy any material part, the revocation will be total if such was the design. In *Doe v. Thomas*, 2 W. Bl. 1043, the testator made a rent in the will without tearing it asunder, and threw it into the fire. After remaining there long enough to be scorched, it was taken out and preserved by an attendant without his knowledge. This was held to be a sufficient tearing and burning to satisfy the requisitions of the statute. The court said it was not necessary that the instrument should be totally destroyed, consumed, burned, or torn to pieces. Throwing it in the fire with an intent to burn, though it was only very slightly singed and fell off, might be sufficient. It is well settled, in accordance with this decision, that if the testator does enough to show that he intends that what he does, shall, without more, countermand the will, it will be a revocation. *Warner v. Warner*, 37 Vermont, 356; *Evans' Appeal*, 8 P. F. Smith, 233; *Elms v. Elms*, 1 Swabey & Tristram, 155.

On the other hand it is equally clear under the authorities, that the plainest intent to revoke the will will be ineffectual if not manifested in the way the law requires. There must either be an act operating physically on the instrument and rendering it other than it was in the first instance, or a writing duly signed and published. A direction that the will shall be destroyed, which is not fulfilled from any cause however fraudulent, will not be a revocation; *Andrews v. Motley*, 12 C. B., N. S. 513, 524, 534; and so if the testator attempts to destroy the instrument himself and is prevented by violence or fraud. *Runkle v. Gates*, 11 Ind. 95; *Kent v. Mehaffey*, 10 Ohio, N. S. 204;

*Clingman v. Micheltree*, 7 Casey, 25. In *Doe v. Harris*, 6 A. & E. 209, 8 Id. 1, a will which had been thrown into the grate by the testator was removed by his housekeeper without his consent. The envelope was slightly singed, but the fire had not reached the body of the instrument. The testator manifested his displeasure, and after demanding the will in vain, exacted a promise that it should be destroyed, which was not kept. The court held that the evidence did not establish a revocation. An intention to burn was not enough, however clearly manifested. It was not necessary to say how much of the will must be consumed, but there must be such an injury as destroyed the entirety of the will, so that it could be said that the instrument no longer existed in the same condition. The decision was founded wholly on the statute which, in enumerating certain modes of revocation to the exclusion of all others, however clearly they may show the testator's purpose, speaks only of devises of land. Accordingly, in an ejectment brought on a devise of copyholds in the same will, the court gave judgment for the heir, on the ground that the intention to revoke was as plain as if the means had been carried into effect. *Doe v. Harris*, 8 A. & E. 1. This distinction has no place under the legislation now prevailing in England and the United States, which brings all testamentary writings to a level, and requires the same form to be observed whether they pass land or chattels.

Tearing, cancelling and obliterating, are words of similar import, although the signification of cancelling would seem large enough to include the others. *Evans' Appeal*, 8 P. F. Smith, 238. A will which is torn or erased is cancelled, although it may be cancelled without tearing or erasure. Any mutilation which manifests a formed design to annul the instrument will be a cancellation. *Warner v. Warner*, 37 Vermont, 356; *Evans' Appeal*, 8 P. F. Smith, 238. In *Moore v. De la Torre*, 1 Phillimore, 375, this result was held to follow from drawing a knife down the side of the will and through the attestation so as to sever the body of the instrument from the margin, although the signature was not cut out or the writing marred. In like manner a line drawn with a pen through the body of a will and the name of the testator is *prima facie*, and in the absence of proof to the contrary, a cancellation. *The Church v. Roberts*, 2 Barr. 110; see *Stephens v. Taswell*, 2 Curteis, 458. To use the language of the court, in *Elms v. Elms*, 1 Swabey & Tristram, 156, the question is whether the testator intended that what he did should without more countermand the will. If such was his design, a partial erasure or mutilation may be as effectual as if the instrument were destroyed or torn to fragments. *Warner v. Warner*, 37 Vermont, 356; *Evans' Appeal*, 8 P. F. Smith, 239.

When the whole instrument is defaced, or the part struck out is so material that the rest cannot stand, the revocation will be total. But this

inference will not be carried further than the evidence requires. Erasing a particular clause will not revoke another which remains intact. *Clark v. Scripps*, 22 Eng. L. & Eq. 627; *Christmas v. Whingates*, 3 Swabey & Tristram, 81; *Wells v. Wells*, 4 Monroe, 152. The cancellation of a will does not necessarily revoke the codicils, and the codicils may obviously be cancelled without invalidating the will.

It is accordingly well settled that if the cancellation or obliteration of one part of a will can effect another which is in nowise dependent on the first, still this result will not follow as a necessary consequence, nor unless it appears that such was the design. The name of one of several joint executors or devisees may, therefore, be struck out without rendering the gift or appointment invalid, as it regards the rest. *Sutton v. Sutton*, 2 Cowper, 812; *Short v. Smith*, 4 East, 419.

In *Bates v. Holman*, 3 Hen. & Mun, 302, obliterating the name of the testator at the foot of the will was held not to revoke a postscript on the same sheet which was also signed, although both had been written at the same time and constituted one instrument; and (which may seem a stronger instance) in *Brown's Will*, 1 B. Monroe, 56, a clause emancipating the slaves of the testator, was not revoked by the excision of the rest of the will, including the signature. It appeared from the declaration of the testator that he meant the clause to stand, and his signature to a memorandum endorsed on the instrument, that "the within was his will," was said to be sufficient authentication of the contents. When, however, a part governs or is essential to the operation of the whole, it cannot be cut off or erased without rendering the whole inoperative.

Cutting off or erasing the signature of a testator is accordingly a revocation *prima facie*, and unless the contrary intent appears. *Smock v. Smock*, 3 Stockton, Eq. 156; *The Church v. Roberts*, 2 Barr, 110. And in *Avery v. Pixley*, 4 Mass. 460, a devise was held to be revoked by the act of the testator in tearing off the seal. The court said that although the seal was not essential and might have been omitted, still the motive for affixing it was to give force and solemnity to the instrument, and the removal of it indicated that the mind of the testator had undergone a change. The same point was decided in *Davies v. Davies*, 1 Lee's Ecclesiastical R. 444; and *Lambell v. Lambell*, 3 Haggard, 568; and in *Price v. Powell*, 3 Exchequer, 341, Martin, B., observed, that a man who puts a seal to his will means to authenticate it in the most solemn way, and taking off the seal is very strong evidence of his wish, that what he has done shall not stand. Acts are symbols which express intention as truly and sometimes more forcibly than language. A revocation might consequently arise at common law from what the testator did as readily as from what he wrote or said; *Doe v. Harris*, 8 A. & E. 1, 11; and the only change made in this re-

spect by the statute is to limit the means through which such an intention may be manifested.

Any act, however slight, that can fairly be construed as a tearing, burning, cancelling, or obliteration, will consequently revoke the will, if such, on a review of all the circumstances, was manifestly the design. *Bibb v. Thomas*, 2 W. Blackstone, 1043; *Warner v. Warner*, 37 Vermont, 356, 366. If the intention is clearly manifested and in the way which the law requires, it will not matter that the testator does not fully succeed in accomplishing his design. An attempt to destroy may be as significant as if it was successful. *Doe v. Harris*, 8 A. & E. 1, 11. If a man were to throw his will into the sea, *animo revocandi*, the instrument would be revoked at common law, whether it went to the bottom or was washed ashore. The principle has not been changed by the statute, and applies when a will which has been thrown into the fire is removed without the knowledge of the testator before it is consumed. *Bibb v. Thomas*, 2 W. Blackstone, 1043; *White v. Casten*, 1 Jones, N. C. 197. If under these circumstances the instrument is so far injured that it can fairly be said to be burnt, the revocation will not be the less total because the injury is partial. *Bibb v. Thomas*, The statute has, however, worked an important change not only in restricting the acts through which a will may be revoked, but by rendering it essential that they should at least, to some extent, be performed. An attempt to burn a will might formerly have been a good revocation, but as the law now stands, the fire must consume, or at the very least, singe or injure some material portion of the instrument. Accordingly in *Doe v. Harris*, 6 A. & E., 209, 8 Id. 1, 11, where the testator was prevented from destroying the will by fraud and violence, the court held that so much only of the devise was revoked as related to his estates of copyhold, and was not within the statute (*ante*, 492).

In like manner, a positive direction to destroy a will, will not be a revocation under the statute unless it is obeyed, and the rule applies even when the design of the testator is frustrated by fraud. In *Boyd v. Cook*, 3 Leigh, 32, where a gross imposition was practiced on a blind man, by leading him to believe that his directions to destroy the will had been executed, the court were of opinion, that a will could only be revoked in the way provided for by statute. If that was not pursued, the court could not enter into a consideration of the cause. A similar decision was made in *Hise v. Fincher*, 10 Iredell, 137, on the authority of *Doe v. Harris*, and the law has been held the same way in several other instances; *Smith v. Fenner*, 1 Gallison, 171; *Clingman v. Micheltree*, 7 Casey, 25; *Kent v. Mehaffy*, 10 Ohio, N. S. 204; *Malone v. Hobbs*, 1 Robinson, 346; *White v. Casten*, 1 Jones, N. C. 197; which establish that the want of the evidence required by the statute, cannot be

supplied by proof that the testator intended to revoke the will, and was prevented from executing his design by fraud, undue influence or violence. *Runkle v. Gates*, 11 Indiana, 95.

That such a deception should be practiced with success, is obviously repugnant to natural justice, and the principle, of jurisprudence which requires that every injury should have an appropriate remedy. It is well settled, that equity will set aside a conveyance or devise procured by fraud, and return the property to the rightful channel. *Huguenin v. Baseley*, 14 Vesey, 273. It will make no difference in the application of this doctrine, that some of the parties who claim under the instrument are free from blame, because a man cannot profit by a fraud without becoming a wrong doer. *Erwin v. Keene*, 3 Wharton, 347. And the case would seem to be substantially the same when a will is fraudulently kept alive contrary to the design of the testator. *Jewett v. Brock*, 32 Vermont, 62; 2 Roberts on Wills, 31. While dicta may be found which sustain this view, it has not been brought to the test of decision, and in *Kent v. Mehaffy*, 10 Ohio, N. S. 204, the court held, that equity was as powerless under these circumstances as the law, and could not give relief by enjoining the guilty party, or deducing a trust from the fraud. If the fraud of the devisee in preventing a revocation of the will made him a trustee for the heir, an heir who fraudulently prevented the execution of a will, would in like manner be a trustee for the intended devisee. If it is true, as these authorities indicate, that such wrongs cannot be weighed in the scales of justice with sufficient accuracy for redress; this result is one which cannot be entertained without regret.

The result of the cases taken as a whole, is : 1st, that a man cannot revoke his will by manifesting his intention in the clearest way, unless he pursues one of the various modes pointed out in the statute, and next, that the cancellation or destruction, need not be complete if the intention to revoke is plain, and the testator accomplishes all that he designed to do for that purpose. *Andrew v. Molley*, 12 C. B., N. S. 514, 523, 525.

We have seen that an act begun but not completed, may be a revocation if the revoking purpose remains unaltered, and the testator is prevented from carrying out his design by circumstances which he cannot control (ante, 491). And it is well, equally well, settled that if the testator changes his mind before the revocation is accomplished, what he has already done will go for nothing. *Elmes v. Elmes*, 1 Swabey & Tristram, 155 (ante, 490).

The acts enumerated in the statute are symbolical, and only weigh as evidence of intention. When a man who has thrown his will into the fire, takes it out again before it is seriously injured, the inference in favor of revocation is obviously at an end, and the same result will

follow wherever the evidence as a whole shows an unaccomplished purpose. Accordingly, where the testator began to tear off the seals of his will, for the purpose of cancelling it, but stopped short while there was one remaining, on learning that the draft of instructions to his solicitor which he had just signed, would not be effectual as a devise, in case of his death before it was finally executed, it was held not to be a revocation; *Hyde v. Hyde*, 1 Equity Cases, Abr. 409. A similar decision was made in *Doe v. Perkes*, 5 B. & Ald, 489, where the testator tore his will into four pieces, and was proceeding to tear it still further with the design of destroying it, when he was induced to desist by the entreaties of those around him, and immediately afterwards put the pieces together, with an expression of satisfaction, at not having accomplished his design.

The same principle was applied in *Breathett v. Whittaker's Exr's*, 8 B. Monroe, 530; while in *Giles v. Giles*, 1 Cameron & Norwood, 274, the presumption that would have arisen from the direction given by the testator to destroy the will, was said to be rebutted by his failing to destroy the instrument himself, when it was placed in his hands for the purpose.

When a testator who has two copies of the will in his possession, destroys one of them and leaves the other intact, a question arises which it is not always easy to solve. The inference, in such cases, would seem to be in favor of revocation; *Burtenshaw v. Gilbert*, 1 Cooper, 49; *Roberts v. Round*, 3 Haggard, 548, *Pemberton v. Pemberton*, 13 Vesey, 210, although it may be overcome by showing that he kept the uncanceled duplicate with other papers of importance, and spoke of it as still in force and operative. On the other hand, when the copy which is destroyed, is the only one within the reach of, or subject to the immediate control of the testator, the inference that he meant to revoke both, will be strong if not irresistible. *Richards v. Mumford*, 2 Phillimore, 23; *Colvin v. Frazier*, 2 Haggard, 357.

It need hardly be said, that the existence of a sound and disposing mind and memory, is as essential to the revocation of a will by a testator, as to its original execution. A revocation, therefore, by a man who is *non compos mentis*, is inoperative; *Ford v. Ford*, 7 Humphreys, 92; *Alison v. Alison*, 7 Dana, 94; *Idley v. Bowen*, 11 Wendell, 227; and the result will be the same where the execution of the revoking act or instrument was induced by duress or fraud. *O'Neal v. Farr*, 1 Richardson, 80; *Laughton v. Atkins*, 1 Pick, 535. Under these circumstances, moreover, or when the destruction of the instrument is fraudulent or wrongful, the testimony of persons who are acquainted with the contents, may be received to establish the will. *Clark v. Wright*, 3 Pick. 67; *Idley v. Bowen*.

There has been much discussion as to the signification of the words



“burning, cancelling, tearing, or obliterating,” employed in the statute of frauds, and which have been reproduced in the legislation of the United States. In *Moore v. Moore*, 1 Phillimore, 375, it was contended by the counsel retained on behalf of the legatee, that cancellation implied such a cutting or marking of the instrument as would wholly sever the connection of its parts, or extend across its whole surface; and it was insisted that drawing a knife down the side of the writing, so as to divide it from the margin, was not a cancellation within the meaning attached to the word in the statute, although the cut was prolonged across the attestation and through the signature of the testator. The court, however, held that any cutting or marking, indicating an intent to destroy the integrity of the instrument, was a cancellation if not satisfactorily explained.

An obliteration or erasure is a revocation at common law and under the statute, of so much of the will as is struck out, and of all that necessarily depends on the part defaced. But it has been said that interlineations are mere declarations of a change of purpose, which although reduced to writing, cannot operate as a revocation under the statute, unless signed and attested as required.

In *Lewis v. Lewis*, 2 W. & S. 455, it was accordingly held that even if the word “obsolete,” written on the margin, was intended to apply to the whole will, it would not be a revocation. It would, however, seem that if the word “obsolete” or “revoked” were inscribed across the will, it would operate as a cancellation, even if ineffectual as a revocation in writing. Any other conclusion would involve the inconsistency of supposing, that giving form and sense to the lines drawn across the face of the paper, can deprive them of the effect which they would have if rude and unmeaning. The difference is obvious between a declaration written and appearing on the will and in a separate instrument, and while the latter cannot be valid unless signed by the testator, the former may, when such is plainly the design, take effect as a cancellation. *Evans’ Appeal*, 8 P. F. Smith, 238; *Warner v. Warner*, 37 Vermont, 356.

In *Warner v. Warner*, the testator erased several words from the attestation clause of his will, but without effacing the signature, and then wrote below, “this will is hereby cancelled and annulled.” It was contended that as this declaration was not signed, it could not be an express revocation, and that there was no cancellation within the meaning of the statute of frauds. Barret, J., in delivering judgment, said that the word “cancellation” originally signified the act of drawing lines across the writing which it was intended to invalidate. When the whole instrument was, by these or any equivalent means, defaced; when it was torn to fragments or entirely destroyed by fire, there could be no doubt of the sufficiency of the evidence of revocation. It

was not necessary, however, that the act should go so far. It was enough, agreeably to the rule laid down by Mr. J. Coleridge, in *Reed v. Harris*, 6 A. & E. 209, "if there was such an injury with intent to revoke as to destroy the entirety of the will, because it might then be said that the instrument no longer existed as it was." Applying this principle to cancellation, there must be such a marking with intent to revoke, that it might be said the instrument no longer existed as it was. If the testator, in the case before the court, had drawn a line from the top to the bottom of the writing, *animo revocandi*, it would clearly have been a revocation. Was his intention less clear, or should it be less effectual, where, after erasing certain material words, he wrote below that the will was cancelled? It was true that in *Lewis v. Lewis* the word "obsolete" was held not to revoke the will as a whole, or the clause opposite to which it was written in the margin. But that case was distinguished from the one in hand, in that he acted with a view to making a new will, which he did not live to execute.

In *Evans' Appeal*, 8 P. F. Smith, 238, it was held, in like manner, that any act destroying the integrity of the will as a devising instrument might be a valid revocation. *Price v. Powell*, 3 Hurlstone & N 349. When the burning, tearing, or erasing was merely partial, it might be necessary to inquire whether the testator did not stop short in consequence of a change of purpose, but the question was one of intention, and if it appeared that he acted *animo revocandi*, and would have gone further, but for the belief that he had done enough to accomplish his purpose, much less than the entire destruction or obliteration of the will would satisfy the requisitions of the statute. In *Bibb v. Thomas*, 2 W. Bl. 1043, Lord Ch. J. De Grey said, that the statute had specified four several modes in which a will might be revoked, and if these or any of them were performed in the slightest manner, this, joined with a declared intent, would be a good revocation. In the case before the court, a line had been drawn through the signature of the testator, the word "cancelled" appeared below on the same sheet, and there were four considerable rents, indicating that the instrument had been folded and then torn half way across. This state of things was held to afford a presumption of revocation, which, in the absence of rebutting or explanatory evidence, rendered the instrument inadmissible to probate. Any act done to the will which indicated an intention that it should not stand was a cancellation, as a line drawn through a particular clause would be an obliteration, although the writing might be as intelligible as it was before. So a rent might be a tearing within the meaning of the statute, although the parts were not completely sundered. The inference was not less strong when the intention was expressed in terms instead of being manifested symbolically; and "cancelled," or any other equivalent word written on the

will was therefore *prima facie* evidence of revocation. In *Grantly v. Garthwaite*, 2 Russel, 90, inscribing "superseded" on the envelope was held not to revoke the will. A separate writing, unauthenticated by a signature could not operate as a revocation, however clearly it might express the wish of the testator; but when the revoking purpose was impressed on the document itself, and appeared unmistakably on inspection, there was no reason why it should not take effect. A different conclusion had been reached in *Lewis v. Lewis*, 2 Watts & Sergeant, 455, but the word "obsolete" was ambiguous, and did not express the intention of the testator with sufficient clearness. That case could not therefore be regarded as establishing that cancellation was necessarily erasure or defacement, or that marks made on the will with an intent to annul it, and which had become a part of the instrument, would not be a revocation, because they consisted of marks or letters rather than arbitrary lines.

It would seem to follow, that a change of purpose noted and appearing on the will, may satisfy the requisitions of the statute, without being executed in the presence of witnesses, or authenticated by the signature of the testator. Under these circumstances, the will is, agreeably to the dicta in *Evans' Appeal*, cancelled, and can no longer be regarded as the will of the testator. The point has not, however, been decided, and all that the authorities actually establish is, that such a declaration may, when coupled with a tearing or erasure, make up the sum of proof necessary to constitute a revocation. *Warner v. Warner*, 37 Vermont, 356, 364; *Bohannon v. Walcott*, 1 Howard, Mississippi, 336. The rending or obliteration, brings the case within the letter of the statute, while the writing removes any doubt that may exist as to the design. *Warner v. Warner*. It has, however, been said, that to produce this result, the erasure must be material; and that when it is not, a revoking purpose cannot be shown by evidence derived from a contemporaneous interlineation. *Clark v. Smith*, 34 Barb. 140.

It is well established conversely, that as an interlineation may enlarge, so it may control the effect of an erasure by showing either that the testator did not mean to revoke the instrument, or that his purpose was subsidiary to a further and unaccomplished design. *Jackson v. Holloway*, 7 Johnson, 394; *Short v. Smith*, 4 East, 419; *Locke v. James*, 11 M. & W. 901; *Brooke v. Kent*, 3 Moore, P. C. C. 343. In *re Redding*, 1 English Law & Equity, 624, the erasure of the signature of the testatrix, was held not to be a cancellation, because she signed the will again, immediately afterwards, in another name, which, although not her own, was yet one which she had recently adopted, and by which she chose to be called.

In *Bethell v. Moore*, 2 Dev. & Bat. 311, the testator erased his signature, but subsequently signed the instrument anew and added a

codicil, stating that he wished the will to stand as it was originally written, except in certain particulars. The new signature and codicil not being attested as the law required, could not operate as a re-execution or republication of the devise, but they were, notwithstanding, held to show that the cancellation of the will was a mere step towards an end which had not been accomplished, and therefore would not operate as a revocation.

It was said in *Wickoff's Appeal*, 3 Harris, 281, that when there is nothing to induce a different conclusion, alterations and erasures are presumed to have been made before the execution of the instrument, and do not afford evidence of a change of purpose. On the other hand, in *Doe v. Catmore*, 16 A. & E. 745, Lord Campbell observed, that in the case of a deed, an interlining should, if the contrary did not appear, be referred to the time of execution, because such instruments could not be altered without wrong, which the law would not presume, but that the presumption was the other way in the case of a will, which the testator was free to alter or revoke at pleasure. In *Doe v. Palmer*, 16 A. & E. 747, it was accordingly decided, on the authority of *Cooper v. Brockett*, 4 Moore, P. C. C. 419, that alterations appearing on the face of a will, are to be presumed to have been made subsequently to the execution. The court said, that this conclusion was necessary to give effect to the statute, 1 Victoria, c. 26, which declared that no "alteration made in any will shall be valid," unless "executed in the manner hereinbefore required for the execution of the will." The presumption might, however, be overcome by showing that the alteration was in conformity with the original design of the testator, as declared orally at and before the publication of the will. But declarations by the testator after the will was executed, that the alteration had been made previously, would be inadmissible.

Under the statute 1 Victoria c. 26, which now regulates the subject in England, a revocation can only take place by tearing, burning, or destroying the instrument, or by a writing duly executed as a will; and in *Stephens v. Taffrell*, 2 Curteis, 438, the court held, that crossing out the signature with a pen, and drawing a line through the body of the instrument, was not a destruction of the will within the meaning of the statute. An obliteration so complete, that the words cannot be decyphered, is, however, a destruction of the instrument as such, and a revocation will follow wholly or *pro tanto*. The change may operate beneficially in some instances, by getting rid of the question whether a mutilation or erasure is to be considered as a cancellation, but may obviously defeat the intention of the deviser in others, as it seems to have done in *Stephens v. Taffrell*.

We have seen that the cancellation or destruction of a will is merely *prima facie* evidence of a revoking purpose, which may be overcome

by proof that such was not the design. And it has been held that even when the intention to revoke is clear, it may still be shown to have been induced by fraud or misapprehension, or to have been a step towards the accomplishment of an end which failed. *Onions v. Tyrer*, 1 Peere Williams, 345; *Burtenshaw v. Gilbert*, 1 Cowper, 49. The revocation of a bequest under a mistaken belief of the death of the legatee, will consequently not be allowed to deprive him of a benefit which the testator would not have withdrawn if he had not been misinformed. *Campbell v. French*, 3 Vesey, 321; *In re Moresby*, 1 Haggard, 378. And the principle is the same where the revocation is in writing, although it seems that the mistake must, under these circumstances, appear on the face of the instrument. *Mordecai v. Boylan*, 6 Jones, Eq. 365; *Campbell v. French*, 3 Vesey, 321; *In the goods of Richard Moresby*, 1 Haggard's Ecclesiastical R. 378. In *Doe v. Evans*, 10 A. & E. 228, the testatrix gave certain lands to a nephew for life, remainder to his first and other sons in tail, and in default of such issue, then to the daughters of the first devisee, in the same order of succession. The tenant for life under this devise, and one son who survived him, died in the lifetime of the testatrix, who then executed a codicil reciting the death of her nephew without issue, and making a different disposition of the estate. The recital was untrue in point of fact, the nephew having left a daughter, of whose birth the testatrix was ignorant at the time of making the codicil, although she became acquainted with it subsequently, and more than two years before her death. Under these circumstances, the court were of opinion, that the codicil was subject to an implied condition which had failed; but it was not said whether the condition was precedent or subsequent, nor whether the death of the daughter in the lifetime of the testatrix, would have rendered the codicil operative. See *Mordecai v. Boylan*, 6 Jones Eq. 365.

It follows for a like reason that when a will is erased or cancelled with a view to a new disposition of the estate, which is not made, or fails from not being executed, the presumption in favor of revocation will be repelled, and the devise will take effect as originally framed. In *Short v. Smith*, 4 East, 419, the testator struck out the name of one of the persons to whom the estate was devised in trust, and interlined two other names in the same clause. It was contended under these circumstances, on behalf of the heir, that the devise had been revoked by the erasure, and that the interlineation was not valid for want of the attestation required by the statute. The instrument in evidence was not that which the testator executed, and therefore could not take effect as his will. But the court held that the object, as disclosed by the interlineation, was not to destroy the trust but to render it more effectual. Such an erasure might operate as a partial revocation without affecting the rest of the will. But in the case under consideration the will was

not even partially revoked, because if the testator had known that the new trustees could not take under the devise, he would, presumed, have allowed the instrument to stand as it was originally written.

It is well established in accordance with this reasoning that when words or clauses are erased in order to substitute others which fail for want of due authentication, the obliterations will be regarded as subsidiary to the interlineation, and the devise will take effect as originally made. *Locke v. James*, 11 M. & W. 901; *Doane v. Hadlock*, 42 Maine, 72; *Brookes v. Kent*, 3 Moore, P. C. C. 334; *Jackson v. Holloway*, 7 Johnson, 394; *McPherson v. Clarke*, 3 Bradford, 92. In *Jackson v. Holloway*, the erasure of the words by which certain lands were devised, and the interlineation of others embracing all the real estate of the testator, was, accordingly, held not to vary the operation of the will. In *Brengle v. McPherson*, 2 Brevard, 270, the testator cancelled a clause excepting a portion of his estate from the operation of the will, which gave rise to the argument that the original gift was revoked, and that the devise, which had been substituted for it, was invalid under the provisions of the statute of frauds; but the court were of opinion, that as the revocation was merely subsidiary to a purpose which had failed of effect, and the result of allowing it to stand, would be to benefit the heir at law at the expense of the devisee, in direct opposition to the meaning of the testator, the will should be read as it originally stood before the exception was erased.

The question arose in *Winsor v. Pratt*, 2 Brod. & Bing. 648, in a somewhat different form. A testator who had devised real estate to his wife for life, remainder to his mother for life, remainder over in fee upon certain trusts, made various erasures and interlineations in his will, with the view of restraining the gift to his wife to her widowhood, and revoking that to his mother altogether. He then altered the date of the instrument to the current year, and had a fair copy made of the whole, but died very soon afterwards, without executing it. Under these circumstances, the court held that the acts relied on as constituting a revocation were but part of a series of steps tending to the execution of a new devise, which was the end the testator had in view. That had never been accomplished, and the revocation consequently remained inchoate; and they were also of opinion that if the revocation had been *prima facie* complete, as by tearing or cancelling the instrument, the presumption might still have been repelled by proof that he acted with a view to making a new will, which he did not live to execute. In *Bethel v. Moore*, 2 Dev. & Bat. 311, the testator erased the signature, but subsequently signed the instrument anew and added a codicil reciting that he wished the will to stand as originally written, except in certain particulars. The new signature and codicil were not attested as the law required, and could not operate as a re-execution

or republication of the devise, but they were, notwithstanding, held to show that the cancellation of the instrument was a mere step towards an end which had not been attained, and therefore did not operate as a revocation.

It has also been decided in numerous instances that when a will is revoked by another which makes a new disposition of the property devised, the revocation is relative and dependent, and will fail if the instrument proves invalid as a will. *Eccleston v. Spike*, Carthew, 79.

In *Duross v. Tyler*, 1 Peere Williams, 343, a testamentary writing which was sufficiently executed under the statute of frauds as a revocation, but not as a will, was held to fail in both capacities, because its provisions were substantially the same as those of the former will, which showed that the object was to put the gift in another form and not to recall it. But the case would presumably have been decided in the same way, aside from the special ground, on the general principle that when one devise is revoked by another, the intention of the testator should not be taken by halves and part carried into effect, while the rest remains unaccomplished. The design to revoke is, under these circumstances, *prima facie* subsidiary to that to give; and if the instrument is invalid for the latter purpose, it will fail as to both. *Barksdale v. Barksdale*, 12 Leigh, 535; *Laughton v. Atkins*, 1 Pick. 535.

In *Laughton v. Atkins*, the devising and revoking purpose were accordingly held to be so closely linked together that a decree of a court of probate against the validity of the instrument as a will, was conclusive when it was offered in evidence as a revocation in a court of law. It was said, in like manner, in *Barksdale v. Barksdale*, that every testamentary revocation was based on the supposition that the instrument would be effectual as a will. The act was a whole and should be so regarded. The testator did not suppose that one part of his design would fail, and the other be effectual, but that both would go into successful operation. The revocation was intended to clear the way for the new disposition of the property which was in its turn the motive for the revocation. This was obvious when the revocation was implied, and not less true when it was expressed. If land which had been bequeathed to A. was devised to B., both gifts could not stand, and the second would supersede the first. But if the latter instrument was from any inherent cause inoperative as a devise it would also fail as a revocation. It was inconceivable that the testator proceeded on the hypothesis that the instrument which he used to effect his object was invalid, nor could it be conceived that when he revoked a former gift and made in the same breath a new disposition of the fund, he anticipated that the revocation would have a different fate from the bequest.

In *Powell v. Powell*, 1 Law Rep. Probate & Divorce, 209, this

doctrine was carried further than it had yet gone. The testator in that case made a will on the 3d of March, 1862, and a second will revoking the first on the 29th of March, 1864. In 1865 he destroyed the will of 1864, his intention as expressed at the time being that the former will should stand. By the statute, 1st Victoria, c. 26, the destruction of a revoking will is not a revival of one of earlier date. Sir J. P. Wilde observed that the doctrine of dependent relative revocation properly applied to such facts as those before the court. That doctrine was based upon the principle that the acts by which a testator might physically destroy or mutilate a testamentary instrument were in their nature equivocal. They might be the result of accident, or spring from various intentions if designed. When the act was done solely with the purpose of setting up and establishing a former will, for which the destruction of the revoking will was intended to make way, it was clear that the *animus revocandi* had only a conditional existence depending on the validity of the instrument intended to be revived. Hitherto this method of reasoning had only been applied where the execution of one instrument accompanied the destruction of the other, and there was no recorded instance where the design was to revive a will of earlier date. The cases were, however, the same in principle. In both the revocatory act was referable not to any absolute purpose to revoke, but to an intention to validate another instrument, and necessarily failed, unless this design could take effect. It followed that there was no revocation in the case before the court, and that the will which the testator had destroyed might be admitted to probate on showing what it had contained.

It results from these authorities that when an instrument drawn both as a revocation and a will, is ineffectual and void in the latter capacity, it will be equally inoperative in the former. A different rule prevails when the subsequent bequest fails not from the insufficiency of the means employed to make the gift, but from the incapacity of the donee to receive it. For, under these circumstances, the defect lies beyond, and does not affect the instrument, or prevent it from operating as a revocation of the antecedent bequest. *Calvin v. Waterford*, 20 Maryland, 357; *Harriston v. Harriston*, 30 Mississippi, 276; *Read v. Manning*, Ib. 308. Giving that to B., which has previously been given to A., shows that the donor has changed his mind with regard to A., whether B. is or is not able to accept. In *Harriston v. Harriston*, the devise was to a slave, who by the laws of Mississippi could not take, but the instrument was, notwithstanding, held to be an effectual revocation of a prior will. It was said that the cancellation or obliteration of a will is an act equivocal in its nature, and only *prima facie* evidence of an intent to revoke. When, therefore, such an act is associated with and dependent upon another which



fails, the presumption in favor of revocation is repelled. But this doctrine which is known as that of dependent relative revocation, does not apply when a will containing a clause of revocation is duly executed, and only fails in consequence of the legal disability of the devisee. Under these circumstances the revocation is independent of the devise, and may be effectual, notwithstanding the incompetency of the devisee. And this will be true even if the testator labors under a mistaken impression as to the rule of law, and would not revoke the first will if he knew that the other would be inoperative. In the subsequent case of *Read v. Manning*, the court held that the principle is the same when the revocation is implied, and that a will may be revoked by a codicil making a different disposition of the estate which fails for illegality.

In *Price v. Maxwell*, 4 Casey, 39, it was held for a like reason, that a will which failed as a charitable devise in consequence of not being executed as the statute required, was, notwithstanding, a revocation of a prior will. The original design of the testator had been abandoned, and it was not certain that he would have adhered to it if he had known that the new disposition of his estate would not take effect. Under these circumstances the safest course was to hold both wills inoperative, and allow his property to descend in the ordinary course. The rule in regard to revocations arising from inconsistent dispositions, was said by Lewis, C. J., in delivering the opinion of the court, to be that where the second devise fails by reason of a defective execution of the instrument, it is not a revocation of the first; Jarman on Wills, 154; but where it fails from want of capacity in the devisee to take, the prior devise is revoked. *French's Case*, 1 Roll Abr. 614, pl. 5; *Roper v. Radcliffe*, 10 Mod. 230; 8 Vin. Abr. 141, tit. Devise R. 3; *Laughton v. Atkins*, 1 Pick. 535; *Ellis v. Smith*, 1 Ves. Jun. 17, Jarm. 154; *Jones v. Murphy*, 8 W. & S. 300. The doctrine had been accurately stated by Mr. Justice Rogers in *Jones v. Murphy*. If the second will was duly executed in pursuance of the statute, though it should fail to pass the estate in consequence of the incapacity of the devisee, or any matter dehors the will, it would still revoke the former will. It was accordingly well settled that a devise to the poor of a parish; to a corporation incompetent to take; to a Papist prohibited by statute, or to the heir at law who took by virtue of his better title (although in each case the devise was void), would, nevertheless, be a revocation of a prior devise to a person who was competent to take.

This reasoning is refined, is it also sound? It was questioned by the court in *Lunghon v. Atkins*, 1 Pick. 535 (ante, 503), and the remarks of counsel in that case, and in *Harriston v. Harriston*, merit attention. The argument that a testator, who revokes one will, in order to make another, would presumedly have allowed the former to stand, if

he had known that the latter would be ineffectual, would seem to be equally strong, whether the second bequest fails from an inherent defect, or the incapacity of the donee.

It is however, obvious, that an intention to revoke the will absolutely, and at all events, ought not to fail because it is associated with a disposing purpose, which does not take effect. *Berkshire v. Hopkins*, 23 Georgia, 332. Dissatisfaction with an existing will, may be the chief motive for wishing to make a new one, and when such is the case, the revocation of the objectionable instrument is a primary object, although there may also be a design to execute another. Hence, where the cancellation of a will was accompanied with a memorandum, stating that it was done in consequence of the death of the testator's wife, which rendered it necessary to make a different disposition of the estate, the court were of opinion, that the revocation was not less absolute because it was designed to clear the way for a subsequent devise, which was not executed. *Simmes v. Simmes*, 7 Harris & Johnson, 388. And in *Johnson v. Brailsford*, 2 Nott & McCord, 272, the presumption arising from tearing off the seals of a will, was held not to be rebutted by a cotemporaneous memorandum, stating that the will was defective, and expressing an intention to alter it, although followed by evidence, that the testator directed another will to be drawn, which he did not execute.

As a will depends for its effect on the intention of the testator, it will be revoked by a subsequent will or codicil which manifests a change of purpose in express terms, or by making a different disposition of the property bequeathed. *Larabie v. Larabie*, 2 Williams, 274; *Simons v. Simons*, 26 Barb. 28; *Brant v. Wilson*, 8 Cowen, 56; *Read v. Manning*, 30 Mississippi, 308; *Snowhill v. Snowhill*, 3 Zabriskie, 447; *Derby v. Derby*, 4 Rhode Island, 414. The presumption is, however, in favor of the continuance of an intention which has been formally expressed, and no change will be made in the provisions of the first devise, that is not necessary to bring them into harmony with those of the second. If, when these are fully executed, anything is left on which the former will can operate, it will be as effectual within these limits, as if the latter had not been made. *Bradford v. Forbes*, 9 Allen, 369; *Colt v. Colt*, 32 Conn. 422. A devise of land to A., remainder to B., will not for instance be revoked, as it regards the life estate, by a codicil bequeathing the remainder to a third person. In *Brant v. Wilson*, 8 Cowen, 56, land was devised in fee, and it was subsequently declared by codicil, that if the devisee died without issue male, one-half of the estate should go to his widow for life, and the whole be divided at her death between his daughters. The court held, that the first will remained in force, as it regarded the moiety of the estate which was not disposed of by the second, until after the death of the widow. It

is well settled, moreover, that wills executed at different periods, should, when there is no necessary inconsistency, be regarded as parts of one design, and receive such an interpretation as will give due effect to each. *Schultz v. Schultz*, 10 Grattan, 358; *Inglehart v. Kernan*, 10 Maryland, 159. In *Inglehart v. Kernan*, it was said to be an invariable rule, not to disturb the provisions of a prior will, further than was absolutely requisite to make way for one of later date. It is well settled in the English Courts of Probate, agreeably to this doctrine, that instruments varying in form and executed at different periods, may, if clearly testamentary and duly authenticated, be admitted to probate as together constituting the last will of the deceased. *Lenage v. Goodbou*, 1 L. R. 65, Probate & Divorce; *Wickoff's Appeal*, 3 Harris, 281, 290.

In *Lenage v. Goodbou*, the will of a man was accordingly said, by Sir J. P. Wilde to be the aggregate of his testamentary intentions, so far as they are manifested in writing duly executed according to the statute. Hence, if a subsequent testamentary paper be partly inconsistent with one of earlier date, the latter instrument will revoke the former as to those parts only where the inconsistency exists. The principle applies even when the subsequent testament is entitled or described by the testator as his "last will," because this only shows that the paper in question contains his last or final purpose with regard to the matters to which it relates, and it may still be necessary to look back in order to ascertain his whole design. *Lenage v. Goodbou*; *Cutts v. Gilbert*, 1 Sparks, 417; 9 Moore P. C. 131. And as a will may consist of several sheets making up one document, so several independent documents may together make up a will. *Lenage v. Goodbou*, 1 L. R. P. & D. 57. It results from the same principle that the republication of a former devise will revoke another of later date, which is inconsistent with the first. *Rogers v. Peters*, 1 Adams, 30. A codicil annexed, or referring to a will, may accordingly, by republishing it, operate as a revocation of a devise of later date; *Neff's Appeal*, 12 Wright, 401; and the presumption cannot be countervailed by parol evidence that the testator was influenced by a mistaken belief that he was republishing the second will. *Walpole v. Chalmondeley*, 7 Term, 138, 3 Vesey, 402. In *Neff's Appeal*, a codicil annulling some of the provisions of a will was accordingly held to revive the rest by implication and revoke an intermediate testament by which the first was annulled.

A republication is, however, simply an affirmation that the instrument is the will of the testator, and republishing one devise will not revoke another unless the instruments are so far contradictory that both cannot stand. In *Smith v. Cunningham*, 1 Adams, 281, the testator in republishing various codicils, executed at different periods, passed over one, and it was contended that the codicil so omitted fell within the maxim *expressio unius exclusio est alterius*, and was im-

pliedly revoked. But the court admitted the codicil to proof on the ground that a negative or disabling operation could not be assigned to an act which, like republication, is essentially affirmative. A similar decision was made in *Wickoff's Appeal*, 3 Harris, 281, where it was also said that if a presumption of revocation had arisen, it would have been repelled by the declarations of the testatrix which showed that she regarded the omitted codicil as a part of her will. It may be inferred from these decisions that the republication, like the execution of a testament, will not revoke another devise which is not repugnant to the instrument which the act authenticates.

It follows, from what has been said, that those who allege that the provisions of an earlier will have been revoked by one of later date, must make out their case by producing the instrument, or showing that it cannot be found and proving the contents by secondary evidence. The point arose as far back as *Hitchins v. Bassett*, 2 Salkeld, 592. It was there found specially that, after the making of the will in controversy, the testator executed another of which the contents were unknown. Judgment was entered on the verdict for the devisee on the ground that as the second will might relate to other lands, or repeat the provisions of the first, it did not appear that the latter was revoked.

In the subsequent case of *Goodright v. Harwood*, 3 Wilson, 497, the jury found that the will under which the defendant claimed was duly executed, but that another will was made subsequently which differed from the first, although in what particulars they were uninformed. The Common Pleas held, in opposition to the opinion of Blackstone, that the earlier will was revoked, and distinguished the case from *Hitchins v. Bassett*, on the ground that the wills were in that instance not shown to differ, and might be presumed to be the same. Chief Justice Gould observed, that difference necessarily implied diversity, and as both instruments could not stand together the earlier was necessarily invalid. And Nares, J., added that even where, as in *Hitchins v. Bassett*, there is no proof of diversity, identity should not be presumed as against the heir who is favored by the law.

This argument is obviously fallacious, because the burden of proof is on those who allege a revocation, to show in what the purpose of the testator has undergone a change. It is consequently not enough to prove that a second will was executed varying from the first, without establishing the nature and extent of the difference—what has been altered and what remains the same. In the absence of such proof there is nothing on which to found an inference that the former will was revoked. A total revocation cannot be deduced from a difference which may be merely partial, and if the hypothesis of a partial revocation be adopted, there is no reason for applying it to one part of the will rather than another.

The King's Bench accordingly reversed the decision of the Common Pleas; and the judgment of reversal was affirmed on error by the House of Lords. In the principal case, McKean, C. J., relied on the case of *Hitchins v. Bassett*, as conclusive, that the execution of a second will of which the contents are unknown, will not operate as a revocation; and the law is well settled on this basis. *Cutto v. Gilbert*, 9 Moore, P. C. 131; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Hylton v. Hylton*, 1 Grattan, 161; *Jones v. Murphy*, 8 W. & S. 275.

When the loss of a subsequent will is duly proved, secondary evidence may be given of the contents, and if it is shown by these means to be inconsistent with the first, the latter will be revoked wholly or *pro tanto*. *Brown v. Brown*, 8 Ellis & Bl. 870, 886; *Jones v. Murphy*, 8 W. & S. 275; *Legare v. Ashe*, 1 Bay, 464; *Day v. Day*, 2 Green Ch. 330.

In this, moreover, as in other cases, the want of direct proof may be supplied by inferences drawn from any legitimate source. It is a well established maxim that when a man wrongfully suppresses evidence, every reasonable presumption should be made against him and in favor of the party whom his conduct tends to injure. 1 Smith's Leading Cases, 6 Am. ed. 590. A legatee or devisee who destroys or abstracts a subsequent will may justly be supposed to have done so because it was an express or implied revocation of the instrument under which he claims.

Accordingly, in *Jones v. Murphy*, 8 W. & S. 275, where the question was whether the will on which the plaintiff relied had been revoked by another, the jury were instructed that if the disappearance of the latter was due to the unauthorized act of the plaintiff, their verdict should be in favor of the defendant. Here the guilty party was actually in court and exposed to the full force of the presumption. A more difficult question would arise if the subsequent will were shown to have been destroyed by a third person, who, though claiming under the former will was not a party to the suit. Under these circumstances there would still be a presumption that the act was prompted by interest, and that the first will was revoked; but it does not follow that it could justly be made a ground of decision against a person who did not participate in the wrong.

On principle and under the provisions of the statute, if the writing by which a testament is revoked be duly executed, it need not be testamentary. A letter signed by the testator commanding the destruction of the will might, for instance, operate as a revocation in Pennsylvania. See *Walcott v. Dchterlony*, 3 Curties, 380.

In general a writing which is not executed as the law requires cannot be a revocation, even when inscribed on the same paper as the will. In *Hays v. Harden*, 6 Barr, 409, however, where the signature of the testator was followed by a clause containing an additional substantive devise, and subscribed by witnesses, but not signed, the instrument

was not admitted to probate. The court said that under the provisions of the act of 1833 the will must be "signed at the end thereof," and that it was better that an informal addition should operate as a statutory revocation, than that a rule which the Legislature had introduced for wise purposes should be frittered away.

The question arose in *Glancy v. Glancy*, 17 Ohio, N. S. 131. In the year 1859 the testator, David Glancy, drafted a testamentary writing, which he signed, but it was not published in the presence of witnesses, nor attested and subscribed by them as the statute of Ohio requires. On the 21st February, 1860, Glancy sent for two of his neighbors, and having added a clause providing for after born children, which he did not sign, acknowledged the instrument as his will in their presence, and asked them to attest it by their signatures, which was done. The court cited and relied on *Hays v. Harden*, but limited themselves to deciding that the instrument was invalid and could not be admitted to probate. It would seem that neither of these cases can be regarded as establishing that an instrument which has been duly executed and published as a will can be revoked by the subsequent addition of a clause which is not signed. This is obviously true of *Glancy v. Glancy*, and may seemingly be said of *Hays v. Harden*, where it did not appear that the additional clause was subsequent, and not written at the time.

Whatever the rule may be on this point, it is clear that where the matter following the signature is not testamentary, and does not vary what goes before, it will not invalidate the instrument. In *Wickoff's Appeal*, 3 Harris, 281, a memorandum, immediately below the signature, in the handwriting of the testatrix, containing a recital that the will had been commenced in the year 1843, and added to as occasion required, was accordingly held not to be a sufficient reason for refusing probate.

It is well settled, that when a will, known to have been in the possession of a testator, cannot be found at his death, the presumption is that it was destroyed by him, *animo revocandi*, and those who seek to establish such a will must consequently assign some other cause for the disappearance of the instrument, and sustain the allegation by proof. *Brown v. Brown*, 8 Ellis & Bl. 876; *Jackson v. Bells*, 9 Cowen, 208, 6 Wend. 173. The principle is the same when the will is found with the signature erased, the seals torn off, or so mutilated in other respects, as to indicate that the purpose with which the act was done, was one of cancellation. *The Baptist Church v. Robbarts*, 2 Barr, 110. In either case the will is revoked *prima facie*, unless there are other circumstances giving rise to a contrary presumption. *Clark v. Wright*, 3 Pick. 37; *Bowen v. Foley*, 11 Wend. 227; *Hibbard v. Ferris*, 2 Bradford, 334; *Clark v. Morton*, 5 Rawle, 212; *Brown v. Brown*, 10 Yer-

ger, 84; *McBeth v. McBeth*, 11 Alabama, 596; *Weekes v. McBeth*, 14 Id. 474.

The rule was derived from the civil law, and has been frequently enforced by the ecclesiastical courts; *Moore v. Moore*, 1 Phillimore, R. 375; *Richards v. Mumford*, 2 Id. 23; *Losley v. Jackson*, 3 Id. 26; *Wilson v. Wilson*, Ib. 52; *Davis v. Davis*, 2 Adams, 223; *Kirkcudbright v. Kirkcudbright*, 1 Haggard, 325; *Calvin v. Frazier*, 2 Id. 266; *Welch v. Phillips*, 1 Moore, P. C. C. 299; but it is equally applicable when the question arises on a devise of real estate and in a court of common law. *Browne v. Browne*, 8 Ellis & Bl. 876. It rests on the double ground, first, that a remote cause ought not to be sought for when there is one lying near at hand, and next that guilt ought not to be supposed when the act is reconcilable with innocence. Both grounds were taken in the principal case, where McKean, C. J., said that the persons interested in the destruction of the will were not in the United States, and that charity would induce a belief the testatrix herself destroyed it. *Wickoff's Appeal*, 3 Harris, 281, 290. In *Jackson v. Betts*, 9 Cowen, 208, 6 Wend. 173, a will in the keeping of the testator, and which he republished shortly before his death, could not be found after his decease. Under these circumstances, the Supreme Court held that the presumption in favor of the continuance of things in their original condition, was not counterbalanced by the loss of the instrument, which might be due to a variety of causes, and could not be ascribed with certainty to the testator. But the judgment was reversed by the Court of Errors, on the ground that when the disappearance of a will is not shown to be due to other or external causes, the natural, and therefore legal inference is, that it was destroyed by the person in whose custody it was at the time, although this presumption may be rebutted by showing that other persons had access to the writing, and that it was presumably destroyed by them.

In like manner, when a will was found in the desk of the testator after his death, with the signature erased, the inference was said to be that the act was his and revoked the will. *The Baptist Church v. Roberts*, 2 Barr, 110. And it seems to be conceded that the presumption arising under such circumstances, will not be repelled by proof that an uncanceled duplicate of the instrument is outstanding in the hands of a third person. *Richards v. Mumford*, 2 Phillimore, 23; *Calvin v. Frazier*, 2 Haggard, 266. The presumption has sometimes been called one of law, and at others, one of fact; *Welch v. Phillips*, 1 Moore, P. C. C. 299; *Cutto v. Gilbert*, 9 Id. 131; *Browne v. Browne*, 8 Ellis & Bl. 876; but the better opinion would seem to be that it is one of law, subject to rebuttal by evidence showing that it is not applicable to the case in hand. *Macklin v. Macklin*, 14 Vermont, 125; *Jones v. Murphy*, 8 W. & S. 275. There is a well known distinction between

those presumptions of law, which, like that arising from the lapse of twenty years, in the case of a bond, may be disproved, and presumptions *juris et de jure*, which are in the nature of an estoppel, and cannot be gainsaid. If a will which is traced into the possession of the testator, cannot be found at his death, and there is no other proof, the legal inference is that it was revoked by him, and the jury should be so instructed by the court. *The Church v. Robbarts*, 2 Barr, 111. It will not be enough under the circumstances, to show that the testator had no motive for destroying the will; that the inclination of his mind was the other way, and would have led him to favor the devisee; or even that he spoke of the instrument as still in existence and all right. *Smock v. Smock*, 3 Stockton, 156; *Browne v. Browne*, 8 Ellis & Bl. 876, 885.

By what evidence this presumption may be overcome, cannot easily be defined, but it may be less than positive proof. *Macklin v. Macklin*, 14 Vermont, 125. In *Stule v. Price*, 6 B. Monroe, 68, the testator was shown to be a man of loose habits, who kept his papers carelessly, and was frequently intoxicated, and it was held to be more probable that the disappearance of the will was due to accidental causes, than that he had intentionally disinherited a favorite niece, to whom he was much attached. And his declarations, that he had lost the will and would make another like it, were said to be admissible to strengthen this conclusion. So where the will was kept in an open box, with other documents which were of no importance, legatees were allowed to rebut the presumption of revocation, by showing that it was irreconcilable with the language and conduct of the testator. *Davis v. Davis*, 2 Adams, 225.

A similar decision may be found in *McBeth v. McBeth*, 11 Alabama, 596, where the court said that there was no sufficient reason for attributing the disappearance of a will which had been kept in a pocket-book, in an exposed situation, to the act of the testator, and that the scale of the proof was, at all events, turned by a declaration uttered shortly before his death, that he had made a satisfactory disposition of his worldly affairs.

It is obvious, that when the instrument passes out of the possession of the testator into that of an attorney or agent, the presumption that it was destroyed by him, will give place to another, throwing the burden of proof on those who allege a revocation of the will. *Legare v. Ashe*, 1 Bay, 464; *Hildreth v. Schullinger*, 2 Stockton, Ch. 196; *Taylor v. Taylor*, 1 Barr, 464; *Barnet v. Sherrard*, 1 Iredell, 303. Such a change may occur constructively through the extreme illness of the testator, and the opportunity afforded to third persons to have access to the instrument without his knowledge. *Jones v. Murphy*, 8 W. & S. 275. In *Jones v. Murphy*, the court observed that it was idle to say that the will was in



the actual custody of the testator. The condition of his health, and all the testimony forbade such an idea. Practically, it was under the control and in the power of his wife, and other members of the family, who would be gainers by the destruction of the will. Under these circumstances, the question whether it was destroyed by the testator, or by the persons who surrounded him, was one of fact, and should have been submitted as such to the jury.

If the testator is insane, no inference of revocation can be drawn from the disappearance or cancellation of the will; *Brown v. Idley*, 11 Wend. 227; *Clarke v. Wright*, 3 Pick. 67; and in *Sprigge v. Sprigge*, 1 Law R. Probate Court, 608, the court held that where insanity supervenes after the execution of such an instrument, the burden of proof rests on those who contest the right to probate, and it is for them to show that the testator destroyed the will while he was still *compos mentis*, or during a lucid interval. The same point may be found in *Harris v. Burrell*, 1 Swabey & Tristram, 153. It has also been held that the presumption may be rebutted by what appears on the face of the instrument itself, taken in connection with the affection uniformly manifested by the testator towards the persons for whom it made provision, and who were dependent on his bounty for support. *Patton v. Poulton*, 1 Swabey & Tristram, 55.

It is obvious from what has been said, that the presumption varies with circumstances, and cannot easily be reduced to any fixed or definite standard. *Macklin v. Macklin*, 14 Vermont, 125; *Patton v. Poulton*, 1 Swabey & Tristram, 55. Too much weight apparently has been attributed in some of the decisions to the question who was interested in the suppression of the instrument, and not enough to the presumption in favor of innocence. A crime may be fastened on an individual by circumstantial evidence, but it should first be proved that there is a crime. The natural inference from the cancellation of a will is that it was an innocent act, done by the person to whom the dominion over the instrument properly belonged. This presumption obviously cannot be overcome by showing that a disappointed heir or devisee had access to the instrument, and might have destroyed it.

Such a supposition would be as unjust, as a conviction for felony or misdemeanor without proof of the *corpus delicti*. It is necessary, therefore, in every such case, to begin by excluding the agency of the testator. Until this is done, there can be no right to infer that the act was a spoliation, rather than a legitimate revocation of the will. *Ben v. Chesholm's Heirs*, 7 B. Monroe, 408; *Clark v. Morton*, 5 Rawle, 233.

Between two hypotheses, one consistent with innocence, the other necessarily implying guilt, the former should obviously prevail, until negatived by proof. *Williams v. The East India Company*, 3 East,

192; *Rex v. The Inhabitants of Herborne*, 2 B. & Ald. 281. In *Jones v. Murphy* (ante, 512), the court were of opinion that the reconciliation of the testator with his daughter, whom he had disinherited by a devise in favor of his wife, negatived the presumption that a subsequent will by which his property was equally divided between both, had been destroyed by him, and that the jury were consequently at liberty to adopt the other alternative, that the disappearance of the instrument was due to the wrongful act of the person whom it prejudiced. We may, notwithstanding, doubt whether an inference of crime should be drawn from arguments which however plausible, are founded on conjecture or suspicion instead of proof. The presumption in favor of innocence, applies in civil cases as well as criminal; and evidence that a party was interested in committing a crime, will not justify the inference that an event which may have had an innocent cause was the result of guilt. *The Lexington Insurance Company v. Power*, 10 Ohio, 324; *Filer v. Patton*, 8 W. & S. 455; *Morrell v. Melchior*, 30 Mississippi, 516; *Williams v. The East India Company*, 3 East, 192. The jury obviously would not be entitled to infer that the plaintiff, in an action on a policy of insurance, had set fire to his house because it was fully insured, and the lot would be worth nearly as much without the building. *Beaumont v. Thurtell*, 1 Bing. 330. And the case is not materially different when a charge of spoliation is based on the interest of the heir, and the possibility of his having destroyed the will. *Clark v. Morton*, 5 Rawle, 233; *Ben v. Chisholm's Heirs*.

The rule that guilt shall not be presumed, when the circumstances are compatible with innocence, has been applied under a great variety of circumstances. In *Williams v. The East India Company*, 3 East, 192, the action was brought to recover damages for the loss occasioned by the alleged neglect of the defendants, in not giving notice of the dangerous and inflammable nature of the contents of a can of varnish, shipped on board the plaintiff's vessel. Ordinarily, the burden of proof is on him who has the affirmative of the issue; but the court held that the presumption in favor of innocence, made it incumbent on the plaintiff to show that notice was not given, before calling on the defendants for evidence that it was.

"The rule of law is," said Lord Ellenborough, "that where any act is required to be done on the one part, so that the party neglecting it, would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary, that is in such case of proving a negative, on the other side." *Monk v. Buller*, 1 Roll. R. 83. "In a suit for tithes, in the spiritual court, the defendant pleaded that the plaintiff had not read the thirty-nine articles, and the court put the defendant to prove it, though a negative. Whereupon he moved the court for a prohibition; which

was denied: for, in this case, the law will presume that a parson had read the articles, for otherwise he is to lose his benefice; and when the law presumes the affirmative, then the negative is to be proved. This, it will be observed, was in a civil suit. So in *Lord Halifax's Case*, Bull. N. P. 298; Viner, tit. Evidence; upon an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Court of Exchequer, the Court of Exchequer put the plaintiff upon proving the negative, viz., that he did not deliver them; for "a person shall be presumed duly to execute his office, until the contrary appear." And also in *The King v. Coombs*, Com. 57, the defendant swore an affirmative, and an information was exhibited against him for it. And although a negative could not be proved, yet the court directed that they, that is to say, the prosecutors, should first give their probable evidence, and that the defendant should afterwards prove the affirmative, if he could. And the same principle is recognized in Gilbert's Law of Evidence, 148, viz., "that where the law supposes the matter contained in the issue, there the opposite party (that is, the party who contends for the contrary of that which the law supposes,) must be put into proof of it by a negative. That the declaration, in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of a highly dangerous and combustible nature, imputes to the defendants a criminal negligence, cannot well be questioned. In order to make the putting on board wrongful, the defendants must be cognizant of the dangerous quality of the article put on board, and if being so, they yet gave no notice, considering the public danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned, in so putting such dangerous article on board, for which they are criminally liable, and punishable for a misdemeanor at least. We are therefore of opinion, upon the principle and the authorities above stated, that the burden of proving that the dangerous article in question was put on board without notice, rested upon the plaintiff alleging it to have been wrongfully put on board without notice of its nature and quality."

It may be observed, with reference to this decision, that if the defendants ought to have given notice of the contents of the package, the plaintiff ought not to have received it, knowing what it contained. The presumption against wrong, would therefore seem to have been as weighty on one side as on the other, and the explanation of the case apparently is, that the plaintiff having averred gross negligence, was bound to call the persons who were cognizant of the transaction, and could not ask the jury to substitute inference for proof.

In the subsequent case of *Rex v. The Inhabitants of Twynning*, 2 B. & Ald. 281, the controversy was whether a woman had acquired a

settlement by a marriage contracted a year after the departure of her first husband who had not been heard from during the interval. Under these circumstances, it was said that things should ordinarily be presumed to continue in the same condition when there was no evidence of change. In the case in hand this presumption was encountered by that, in favor of innocence, and the latter being the stronger must prevail. The same point was determined in *Greenborough v. Underhill*, 12 Vermont, 604.

A similar decision may be found in *Spears v. Burton*, 31 Mississippi, 547. When, however, the first husband of the woman was proved to have been alive twenty-seven days before the second marriage was celebrated, the court held, that the question was one of fact to be determined on the evidence, and that a death of which there was no proof, should not be presumed contrary to probability, in order to sustain an act which was *prima facie* criminal. *Rex v. The Inhabitants of Harborne*, 2 A. & E. 540. In delivering judgment Lord Denman said, that "nothing is more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age, or health of the party. There can be no such strict presumption of law. I am aware, that in *Rex v. Twynning*, Bayley, J., founded his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it. It may be asked, suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage."

The result of the authorities would therefore seem to be that the presumption in favor of innocence, will not justify a forced construction of the evidence; but that a crime should not be presumed when the facts are reconcilable with innocence unless the evidence is such as to satisfy a reasonable mind that a wrong was actually done. *Beaumont v. Thurstell*, 1 Bing. 339; *Aeby v. Rapelye*, 1 Hill, 9; *Thayer v. Boyle*, 30 Maine, 475; *Shelden v. White*, 35 Id. 227.

To sustain a charge of spoliation, it must consequently appear by some direct means of proof, that the will was not cancelled by the testator, or that it was wrongfully destroyed by another person. *Clark v. Morton*, 5 Rawle; *Chisholm v. Ben*, 7 B. Monroe, 403. It would seem, moreover, that if the declarations of the testator are admissible in cases of this description, which has been denied, they should still not be allowed to rebut the presumption of revocation arising from the disappearance or cancellation of the will without other and corro-

borating evidence. *Clark v. Morton*, 5 Rawle, 235, 245; *Chisholm v. Ben*; *Jackson v. Betts*, 7 Cowen, 208, 6 Wend. 173; *Smock v. Smock*, 3 Stockton, 156.

All the authorities, however, agree that where there is ground for a reasonable inference on the one hand, that the will was in existence at the testator's death, or on the other, that it was suppressed by fraud, the presumption of revocation will be repelled, or to speak more accurately, will not arise. In *Finch v. Finch*, 1 L. R. Pro. & Divorce, 371, a son whom the testator had disinherited came forward officiously to look for the will immediately after his father's death. The search was conducted without witnesses, and when he came out of the room where it had been carried on, he seemed to be concealing something under his coat. He was cited subsequently to contest the will, but did not appear. It was also shown, that the testator said not long before his death, that he meant to leave all his property to his daughter. Under these circumstances the court held, that there was no presumption of revocation, and that the will should be admitted to probate on secondary evidence of its contents.

Sir J. P. Wilde said, that to justify the inference that the testator had destroyed the will, it must appear that it was not in being at his death. It was no doubt true, that if a man died, having executed a will, which could not be found on due investigation after his decease, the law raised a presumption that it was revoked by him. But there was a preliminary question, whether the will was in existence when he died. There could be no difficulty on this head, where search was as generally, made in the depositories of the deceased, by a person whose good faith was beyond suspicion, and who could vouch satisfactorily. In the case under consideration, there was no sufficient proof that the will was not found in the depositories of the testator. It was the non-existence of the paper at the time of death which led to the legal presumption of revocation. In the absence of this basis, the presumption was the other way, and in favor of the continuance of the will as a valid instrument.

It was said, in like manner, in *Padmore v. Wharton*, 2 Sw. & Tr. 449, that there was a material question of fact to be decided before any presumption could arise on either side—was the will found at the decease of the testatrix or not? If it was found at her death, and in an un mutilated state, then she did not revoke it. If it was not so found, there was room and foundation for the revocation which the law would presume, in the absence of testimony to rebut it.

Although the revocation and execution of a will are both in one sense, testamentary, there is this material difference, that one is ambulatory during the life of the testator, and contingent on his death; the other absolute, and designed to take effect at once. A revocatory act,

designed to clear the way for a new disposition of the estate, is, as we have seen, subject to an implied condition, and will fail, unless the devising purpose is carried into effect. *In re Brewster*, 6 Juris. 56; *Evans' Appeal*, 8 P. F. Smith, 238, 248 (ante, 498). But a revocation once accomplished, is final, and cannot be annulled by any subsequent event. The question arose in *Burtenshaw v. Gilbert*, 1 Cowper, 49, where it was contended, that inasmuch as the cancellation of a former will and the execution of a new one had occurred coterminously, they should be regarded as dependent, and the subsequent revocation of the second instrument held to revive the first. This argument was said to be strengthened by the circumstance that a duplicate of the earlier will was found intact among the papers of the testator at his death. Lord Mansfield was, however, of opinion, that when a cancellation or other act of a like nature has once taken effect as a revocation, the disposing power of the instrument is wholly gone, and cannot be revived, by showing that the testator subsequently underwent a change of purpose, and desired the will to stand. In *Walton v. Walton*, 7 Johnson's Ch. 258, the rescission of a contract of sale was accordingly held not to revive a devise which the execution of the contract had revoked; and the rule was applied, with equal stringency, in *Bohannon v. Walcott*, 1 Howard, Miss. 336; *James v. Marvin*, 3 Connecticut, 576; and *Goodtitle v. Otway*, 2 H. Bl. 516.

The principle is the same whether the revoking purpose is expressed by acts or language, and may even apply where it is set forth in writing on the will itself. *Withers v. Mott*, 2 Connecticut, 67. When, however, the intention to revoke is expressed in a writing which is clearly testamentary, it will be subject, *prima facie*, to the general rule, that such instruments are ambulatory and may be recalled at any time during the life of the testator. In *Goodright v. Glazier*, 4 Burrow, 2512, it was contended, on behalf of the plaintiff, that a clause in a later will, revoking one of earlier date, was as conclusive as if the latter instrument had been thrown into the fire or cancelled; and that the destruction of the second will, would not revive the first. The court were, however, of opinion, that acts done through a will, partake of the revocable character of the means, and that the cancellation of a revoking will is consequently a revival of the instrument which it countermands.

A different rule prevailed in the ecclesiastical courts, under which the effect of the cancellation of a subsequent in reviving a prior will, depended on the intention with which the act was done. In *Ex parte Hillier*, 3 Atkyns, 790, it seems to have been thought that the burden of proof is on those who maintain the hypothesis of revocation, and that they must show affirmatively that such was the design. But in *Moore v. Moore*, 1 Phillimore, 375, the Court of Archives and the High Court

of Delegates, arrived at the conclusion that the question is one of fact, depending on the intention of the testator as gathered from the whole of the *res gestæ*. In *Usteeke v. Bowden*, 2 Adams, 116, the legal presumption was said to be neither in favor of nor against the revival of a former uncanceled will by the cancellation of a revoking will of later date. This doctrine is borne out by the general course of decision. *Welch v. Phillips*, 1 Moore, P. C. C. 279; *Kirchudbright v. Kirchudbright*, 1 Haggard, 325; *James v. Cohen*, 1 Curteis, 774; although, in *Welch v. Phillips*, Parke, Baron, inclined to the doctrine of *Burtenshaw v. Gilbert*, that the revival of the former will follows necessarily as a conclusion of law.

A similar view was taken in *Flintham v. Bradford*, 10 Barr, 82, on the authority of the principal case, and of *Goodright v. Glazier*; and it was said that if the presumption of revival could be rebutted by contemporaneous declarations showing that such was not the intent with which the subsequent will was cancelled, nothing that the testator said subsequently could have that effect, nor could it follow from evidence of his reconciliation with the members of his family whom the former will had disinherited. The point is a doubtful one, but the weight of authority in this country would seem to be that while the revocation of the second will is *prima facie* a revival of the first, the question is still one of fact, and the decision must be in accordance with the intention of the testator as shown by his declarations or any other legitimate means of proof. *Boudinot v. Bradford*, 2 Dallas, 266; 2 Yeates, 170; *Taylor v. Taylor*, 2 Nott & McCord, 482; *Langenfeldter v. Langenfeldter*, Hardin, 119; *Calvin v. Wetherford*, 20 Maryland, 357; *Marsh v. Marsh*, 3 Jones, N. C. 177.

In *Calvin v. Weatherford*, the court said, that while the cancellation would not operate as a revival, unless such was the design, it was *prima facie* evidence of an intention to revive, which might be strengthened, qualified, or rebutted by the attendant circumstances and the act and declarations of the testator, and should not be allowed to prevail, when there was just ground for inferring that he believed that both wills were inoperative, and that the land would descend to his heirs.

In *Boudinot v. Bradford*, 2 Dallas, 256, the presumption of revival was in like manner allowed to be overcome by evidence, that the testator declared during his last illness, that he had no will and meant to die intestate. It has, however, been decided in several instances, that an absolute revocation, will be not less effectual, because it is expressed through a revocable instrument, and that a prior devise consequently will not revive on the cancellation of a will, by which it is revoked in terms. *James v. Marvin*, 3 Conn. 576; *Bohannon v. Walcott*, 1 Howard Miss. 336; *Lively v. Harwell*, 29 Georgia, 509. The same

point may be found in *Simmons v. Simmons*, 26 Barb. 68, where the court held, that a will does not revive on the cancellation of a subsequent will, by which it is revoked absolutely and in terms. But this case seems to have been founded on a passage in Powell on Devises, which is said in Mr. Jarman's edition of that work, to be an erroneous inference from *Goodright v. Harwood*, 1 Cowper, 92. It is no doubt true, that a will actually revoked, is as much gone as if it had been thrown into the fire and cancelled. When, however, the revoking instrument is itself ambulatory and never takes effect, it is not so much that the antecedent will is revived, as that it never was revoked. *Flintham v. Bradford*, 10 Barr, 82, 90. The execution of a power by a deed, or other writing operating *inter vivos* is final, unless it is made revocable in terms, but if the power be executed by will, a right of revocation will result from the nature of the means employed. Sugden on Powers, 470, 484. And the case is nearly analogous, when one testamentary writing is revoked by another.

It would seem to follow from these premises, that when the instrument of revocation is itself recalled, it will cease to operate for that or any other purpose. *Marsh v. Marsh*, 3 Jones, 77. In *Goodright v. Glacier*, the revival of the first will was accordingly, as we have seen, held to be a necessary consequence of the cancellation of the second. This conclusion may be logically accurate; but may still, if rigorously enforced, tend in many cases to defeat the real intention of the testator. Few men not versed in the law, are sufficiently cognizant of the distinction between a testamentary revocation and one effected in any other way, to know that the cancellation of an objectionable devise, will revive one of earlier date, which may have been intended to provide for a state of things that has long since passed away, and is less in accordance with the wishes of the testator than the instrument which he destroys.

The large experience of the ecclesiastical courts, accordingly led them to qualify the rule, by looking beyond the formal act of the devisor to his true meaning; *Marsh v. Marsh*, 3 Jones, 77; and their views obtained the sanction of one of the wisest judges of the courts of common law. "If," said Ch. J. Abbott, while sitting as one of the commissioners in *Moore v. Moore*, 1 Phillimore, 375, 406, "it is laid down as an absolute proposition, that the cancelling of the second will necessarily revives the first, cases may be put so distressing, as to make one feel a little doubtful whether such a rule should stand. Suppose a man, having a wife and one child, should make a will leaving his property in a manner suitable to the then state of his family; that he should afterwards have six children born, and then should make a will which he should afterwards destroy; by setting up the first will, you would leave five of the children unprovided for."



The only argument that can be urged against this reasoning, is the necessity for adhering to fixed rules, and the danger of allowing the operation of written instruments to be controlled by parol evidence of an intention, which the parties have not expressed as the law requires. *Flintham v. Bradford*, 10 Barr, 82, 92. This is peculiarly true, when the declarations of the testator are adduced in a controversy arising under his will, because the case is one where men not unfrequently use language to conceal their thoughts from the intrusive curiosity of mercenary or interested relatives and dependants. *Clark v. Morton*, 5 Rawle, 233, 243.

In *Marston v. Roe*, 8 A. & E. 16, the decisions of the ecclesiastical courts were accordingly said not to be in point when the question arises on a devise of land. For as the statute of frauds requires the execution and revocation of such instruments to be authenticated by certain means of proof, so it impliedly excludes evidence of a different and inferior kind. It would seem to follow from this decision, that when a particular mode of authentication is prescribed by statute, it must be pursued in all that tends to vary or establish the will. The statute 1st Victoria enacts that "no will shall be valid unless it shall be signed at the foot or end thereof by the testator or some other persons in his presence and by his direction." Parol declarations are accordingly inadmissible under the provisions of this statute, whether the property bequeathed is real or personal estate; *Quick v. Quick*, 3 Swabey & Tristram, 462; and a similar rule prevails in Pennsylvania, under the Act of April 13th, 1833. *Flintham v. Bradford*, 10 Barr, 82, 92; *Lewis v. Lewis*, 2 W. & S. 455, 457.

An act may no doubt be qualified by the accompanying declarations of the agent; *Doe v. Palmer*, 16 Q. B. 747; *Bateman v. Pennington*, 3 Moore, P. C. C. 225; and the burning, tearing or obliteration of a devise, will not be a revocation if it appears from what is said at the time, that he did not mean to annul the instrument. *Elms v. Elms*, 1 Swabey & Tristram, 155. The legal consequences of an act cannot, however, be varied by a declaration which does not qualify the act itself. We have seen that the language of the testator may be received in evidence to show that the cancellation of a will was relative and depended on the effect which it would have in reviving a former testament (ante). But when the revocation of the second will is absolute, the revival of the first is a necessary inference, which cannot, agreeably to the doctrine of *Goodright v. Glazier*, and *Marston v. Roe*, be repelled by extrinsic evidence that such was not the intention of the testator, or that he acted under the belief that both wills were at an end. It was indeed said in *Flintham v. Bradford*, that where it appears clearly that the testator meant to die intestate and not having the former will within reach, cancelled the other with intent to avoid both,

such intent existing at the time of the cancellation and connected with it, may be given in evidence as part of the *res gestæ* for the same reasons which make it allowable to show by the declarations of the testator, that he threw his will into the fire by mistake and not *animo revocandi*. It is obvious that if a will were cancelled, except the signature of the testator and a clause revoking prior wills, they would not revive. And it may be contended that even where the destruction of the instrument is complete, the declarations of the testator are evidence that he meant the revoking clause to stand. When, however, the revocation is in writing, it cannot be varied or contradicted by parol, and the revival of the antecedent will is a necessary consequence, unless a different intent appears on the face of the instrument.

The question is now closed in England by the statute, 1 Victoria, c. 26, sect. 22, which enacts, that a will revoked in any manner shall not be revived except by a new execution, or a codicil showing an intention of revival. A similar rule has been introduced by statute in Missouri. Under these enactments a testamentary revocation is as absolute as if the instrument which it countermands were destroyed or cancelled, and does not cease to be so on the destruction of the revoking will.

The subject is still open on this side of the Atlantic, where it may be necessary to choose between the inflexible rule laid down in *Goodright v. Glazier*, and the uncertainty attendant on the admission of extrinsic evidence. In a case where formal acts are material only as manifestations of design, the safer course is to regard the cancellation of a revoking will as affording a presumption of revival, which shifts the burden of proof, and makes it incumbent on those who maintain the contrary to show that such was not the purpose of the testator. *Calvin v. Weatherford*, 20 Maryland, 357. All presumptions, said Lord Mansfield, in *Brady v. Curbitt*, 1 Douglas, 30, 39, may be rebutted by every sort of evidence, and if this allegation is too general it should at least be true when the question at issue is one of intention. The answer to this argument is that the revival of the former will is due to a technical rule which operates independently of design. *Marsh v. Marsh*, 3 Jones, 77. In *Flintham v. Bradford*, 10 Barr, 82, where the controversy was whether the cancellation of a will had revived one of earlier date, various matters were relied on as showing that the testator had no such purpose, and was, on the contrary, firmly impressed with the belief that both instruments were equally inoperative, and that his real estate would descend to the heirs-at-law. Among these were the kind feelings entertained by him during the latter years of his life towards certain members of his family whom he had disinherited by the previous will; the sale of part of the land formerly devised, the declarations made by him at different periods, and finally a will of later date disposing of the property in a different way, and which although effectual

as a will of personalty was not so worded as to pass real estate. This offer was rejected at the trial, on the ground that if the acts and declarations of the testator were admissible, to show the intent with which he acted in cancelling the will, the evidence must still be confined to what took place at the time when the act was done. The case was carried on a bill of exceptions to the Supreme Court who sustained the course taken in the court below, and held that the revival of the antecedent will was a legal consequence, unless it could be shown that the failure to cancel it was due to accident or mistake of fact, or to the inability of the testator to obtain possession of the instrument. In *Marsh v. Marsh*, 3 Jones, N. C. 77, the Supreme Court of North Carolina seem to have inclined to this view of the question, but limited themselves to deciding, that where the cancelled will was a substitute for another which had been lost, and was destroyed when that was found, the revival of this earlier will was an inference which there was nothing to rebut.

There can be no doubt in any aspect of the subject that the material question is the intention of the testator at the time, and not what his views and wishes were at any subsequent period. But subsequent declarations may, notwithstanding, be persuasive evidence of his belief that both wills were alike revoked, and that he was about to die intestate. *Boudinot v. Bradford*, 2 Dallas, 256. If arbitrary presumptions are to be adopted in cases of this description to the exclusion of proof, it would seem better to hold that the antecedent will is not revived, than that it is. And such is, as we have seen, the rule established in England by the statute, 1 Victoria, c. 2.

In the instances hitherto considered, the revocation arose from a change in the testator's purpose, expressed in terms or implied by his acts and language. But the same result may follow irrespective of intention from an alteration in the estate devised, or the domestic relations of the testator, rendering the will inapplicable to the actual state of things, and authorizing the inference that it ought not to stand.

When an unmarried man makes a devise, it is a reasonable presumption that he does not look forward to having a wife and child, whom the instrument will deprive of the support to which they are entitled. It is, therefore, an implied condition that if such a contingency occurs the gift shall fail. *Young's Appeal*, 3 Wright, 115, 119. The rule is accordingly established that a will may be revoked by marriage and the birth of issue, for whom it does not provide. *Havens v. Vandenburg*, 1 Denio. 27; *Walker v. Hall*, 10 Casey, 483; *Overbury v. Overbury*, 2 Shower, 253; *Lugg v. Lugg*, 2 Salkeld, 592. Both events must occur when the question grows out of a devise of land; *White v. Burford*, 4 M. & S. 10; *McKnight v. Read*, 1 Wharton, 213, 219;

*Sheppard v. Sheppard*, 5 Term, 51; *Brush v. Wilkins*, 4 Johnson's Ch. 506, 510; *Werner v. Beech*, 4 Gray, 162; *Wheeler v. Wheeler*, 1 Rhode Island, 364, 371; and it seems that a devise to the offspring of a first marriage will not be revoked by taking a second wife who bears a child. *Yerby v. Yerby*, 3 Call. 289; *Savage v. Mears*, 2 Robinson, Va. 570. In *Brush v. Wilkins*, 4 Johnson's Ch. 506, however, Chancellor Kent obviously inclined to the more equitable doctrine, that the will of the testator ought not to be upheld to the entire exclusion of afterborn children; and it has been said that a bequest of chattels may be revoked by the birth of a child, aided by corroborating circumstances. *Johnston v. Johnston*, 1 Phillimore, 447. In the case of a woman, marriage was, however, by a distinction hardly reconcilable with justice, an immediate revocation of a will executed while she was sole; *Forse and Hembling's Case*, 4 Reports, 60, b; *Marston v. Roe*, 2 Casey, 202; *Walker v. Hall*, 10 Id. 403; even when the property was bequeathed to the man who afterwards became her husband. *Forse and Hembling's Case*. The ground assigned for the decision was that if the marriage was not a revocation, inasmuch as the will could not be countermanded after coverture, it would be absolute contrary to the nature of such instruments, which is to be ambulatory till death. It was well established, in accordance with this decision, that the alteration of the status of a woman by marriage, was a countermand of her will in law, and that the instrument did not revive on the death of the husband; and such is still the rule under the statute, 1 Victoria c. 26, and the Act of April 8th, 1833, in Pennsylvania; *Fransen's Will*, 2 Casey, 202; *Walker v. Hall*, 10 Id. 483, 488; although the reason, so far as it lay in the want of testamentary power, has ceased.

It seems to have been thought at one period that this doctrine did not apply under the statute of frauds to devises of land. *Coates v. Hughes*, 3 Binney, 498, 507. In *Willington v. Willington*, 4 Burrow, 2165, Lord Mansfield said, that the reason of the things is the same, whether real or personal estate is in question, and the law was so held in *Christopher v. Christopher*, Dickens, 445; and *Sprague v. Stone*, Ambler, 721. In the subsequent case of *Doe v. Lancashire*, 5 Term, 349, where it was contended that the birth of a posthumous child could not operate as a revocation, because it would be absurd to deduce a change of the testator's purpose from an event occurring after his death; Lord Kenyon answered that such revocations were the result of a condition impliedly annexed to the will and by which it was necessarily avoided when the contingency occurred; and this is now the well settled rule in England as it regards devises of land.

In *Brady v. Cubit*, 1 Douglas, 30, 39, Lord Mansfield declared unreservedly, that this presumption might, like all others, be rebutted by

every species of evidence; and such was the established doctrine of the ecclesiastical courts, where the declarations of the testator were admissible to show that he intended an antecedent will to take effect notwithstanding marriage and the birth of issue. *Lugg v. Lugg*, 1 Lord Raymond, 441; *Johnston v. Johnston*, 1 Phillimore, 447. The dictum of Lord Mansfield in *Brady v. Cubit*, was, however, foreign to the decision which went on the ground of republication, and that the will was not a disposition of the whole estate. In *Marston v. Roe*, 8 A. & E. 14, the question was argued before all the judges, and it was solemnly determined that declarations showing that the testator meant the will to stand, were not admissible to rebut the presumption of revocation. Tindal, Ch. J., said, in delivering judgment, that the question was not the same in the ecclesiastical courts and in the courts of common law, being governed in the latter by the provisions of a statute which did not ordinarily apply to the cases arising in the former. The ecclesiastical courts were concerned in the granting probate of wills and testamentary papers relating to personalty only, and there was no statutory enactment excluding parol evidence of the intention of the testator as to what should or should not be a revocation or republication of a will. On the other hand the statute of frauds had anxiously and carefully excluded such evidence with respect both to the original making and the revoking of wills of land. The decisions of those courts might, therefore, be sound, and yet furnish no authority with regard to the point actually in hand. Looking to the authorities in the courts of common law, the balance preponderated greatly in favor of the proposition that no evidence of intention could be received to rebut the presumption that a will was revoked by a subsequent marriage and the birth of a child. It was, as the judgment of Lord Kenyon in *Doe v. Lancashire* showed, the result of a tacit condition, implied by the law, that the will should not take effect if there was a total change in the situation of the testator's family, and this opinion was confirmed by the declaration of Lord Ellenborough in *Knebel v. Scrafton*, 2 East. 530, that the revocation did not follow, in such cases, from any presumed "alteration of intention." In the analogous case of the revocation of a will by a conveyance executed for a limited purpose, and which did not divest the estate, it was settled under *Goodtitle v. Otway*, 2 H. Bl. 516, that the presumption was *juris et de jure*, and of so violent a nature that it could not be repelled by circumstances. If the conduct or declarations of the testator were admissible to show that he meant the will to stand, other acts or subsequent declarations might be adduced leading to a different inference, and the conflict and uncertainty would arise which the statute of frauds was designed to obviate. The true course therefore

was to reject such evidence altogether as contrary to the intention of the Legislature.

If the conclusion reached in this instance by the chief justice, is irrefragable, his reasoning would seem to rest at one point on an insufficient basis. By the twenty-second section of the statute of frauds, no will in writing concerning any goods or chattels or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him and proved to have been so done by three witnesses at the least. The statute would therefore seem to have been intended to exclude loose declarations and to require the certainty of written evidence, whether, the instrument alleged to have been revoked is a bequest of personalty or a devise of land. Some care is, however, requisite in the application of this rule. What is said may always be given in evidence when it forms a part of what is done. Hence, in determining the interpretation of an equivocal act, the utterances by which it is accompanied should not be overlooked. It is accordingly well settled that cotemporaneous declarations are admissible to show that the obliteration or destruction of a will was due to a mistake, or that the testator changed his mind before his purpose was accomplished. *Elms v. Elms*, 1 Swabey & Tristram, 155; *Doe v. Palmer*, 16 Q. B. 747; *Bateman v. Pennington*, 3 Moore, P. C. C. 223.

In like manner, presence at the ceremony will not constitute a marriage if the dissent of either party is expressed in words. *Doe v. Palmer*; *Flintham v. Bradford*, 2 Barr, 82, 86, 92; *Quick v. Quick*, 3 Swabey & Tristram, 442. An act cannot, however, be varied by a subsequent declaration, nor will any declaration which does not vary the act, affect the consequences. A man who accepts a woman as his wife, cannot exclude her from dower by declaring his design at the church door, nor could he by such means make his children illegitimate, or deprive them of inheritable blood. The effect of marriage as a revocation depends not on any real or supposed change of purpose, but on the inherent unfitness of allowing a disposition made in view of one state of things to take effect under another. It cannot therefore be controlled by any declaration which leaves the cause unchanged.

It is accordingly well settled that the revocation of a will by marriage and the birth of issue, results from a presumption of law, which cannot be rebutted by declarations showing that the testamentary purpose of the deviser was unchanged. *Forse and Hembling Case*, 4 Coke, 62; *Wheeler v. Wheeler*, 1 Rhode Island, 364, 374. The law was so held in *Fransen's Will*, 2 Casey, 202, under the Pennsylvania statute of 1833, although the will was made in favor of the intended

husband of the testatrix, in contemplation of her approaching marriage, and she had declared shortly before her death that she wished the bequest to take effect, and that all her property should go to him.

It was determined in like manner in *Ottway v. Sadlier*, 33 Law Times, R. 46, that marriage was a revocation of a will executed immediately before the ceremony, and making an ample provision for the intended wife. And the same point may be found in *Edward's Appeal*, 11 Wright, 144; and in *The goods of Cadywold*, 1 Swabey & Tristram, 36.

These decisions are a forcible proof of the danger incident to substituting arbitrary rules for principles. At common law, the presumption of revocation by marriage and the birth of issue, did not arise where the wife and children were provided for in the instrument itself, or where the testator had an estate not disposed of by the will, and which would go to them at his death. *Brown v. Thompson*, 1 Pere Williams, 304; *Brady v. Corbett*, Douglass, 31; *Knebel v. Scrafton*, 2 East, 530; *Johnson v. Wells*, 3 Haggard, 561; *Marston v. Roe*, 8 A. & E. 14; *Wheeler v. Wheeler*, 1 Rhode Island, 364; *Brush v. Wilkins*, 4 Johnson, Ch. 506. To hold, as was done in *Ottway v. Sadlier*, that a bequest made expressly in favor of the bride shall not avail the wife, or as in *Fransen's Will*, that a devise to an intended husband shall fail upon the happening of the very event for which it was meant to provide, is so entirely contrary to reason that it could not have occurred in a court that was not constrained to it by statute.

Remedial legislation should, obviously, be read in the light of existing principles, and so interpreted as not to go beyond the evil which it was intended to remove. An express enactment that a will shall be revoked by marriage or the birth of offspring, is, presumably, designed to enlarge the doctrine of implied revocation, and not to exclude any fact or circumstance that would have been admissible to rebut the presumption at common law. *Young's Appeal*, 3 Wright, 115, 119. In *Wheeler v. Wheeler*, 1 Rhode Island, 364, the testator executed a deed of trust reciting his approaching marriage, relinquishing all claim to the property of his intended wife, and conveying his real and personal estate for such uses as he should appoint by will. A similar deed was executed on the same day by the woman whom he was about to marry. Simultaneously with the delivery of these instruments the testator made a will bequeathing all he possessed to his children by a former wife. This was on the 13th of April, and the marriage took place, as had been designed, on the 15th. The will was held not to be revoked, notwithstanding a statute declaring that marriage should operate as a revocation. Green, C. J., said, that declarations of intention, not reduced to writing and authenticated as the statute of frauds required, were inadmissible to establish or disprove a revocation, but

that conclusions drawn from facts might always be negated by facts leading to a different inference. In the case before the court the will was obviously made in contemplation of marriage to exclude the future wife, and should not be defeated by the happening of the event for which it was intended to provide.

In *Wright v. Netherwood*, 2 Phillimore, 266, the death of the wife and child during the life of the testator, was held to re-establish the will by removing the cause which rendered it inapplicable. In *Jarman on Wills*, 117, this decision is said to be at variance with *Marston v. Roe* (ante, 521); but there would seem to be no necessary conflict, because the implied condition may well be so interpreted, as not to take effect unless the testator leaves afterborn children without provision at his death.

It was a principle of the civil, which is now engrafted on the common law, that an infant *en ventre sa mere*, shall in general be considered as *in esse* for every purpose that will tend to his benefit; *McKnight v. Read*, 1 Wharton, 213, 230; *Walker v. Hall*, 10 Casey, 483, 487; *Marselis v. Thalheimer*, 2 Paige, 39; *Evans v. Anderson*, 15 Ohio, N. S. 321; and the birth of a posthumous child will, consequently, be a revocation whenever that result would have followed, if he had been born in the lifetime of the testator. *Doe v. Lancashire*, 5 Term, 49; *Coates v. Hughes*, 3 Binney, 498; *McKnight v. Read*; *Evans v. Anderson*.

The subject is regulated in the United States by statutes which, to a greater or lesser extent, vary the rule of the common law. The revised statutes of New York, provide that marriage and the birth of children shall be a revocation of a previous will, if either wife or child survives the testator, unless a contrary intention appears on the face of the instrument, or there is a provision for the issue of the marriage by a settlement or in the will itself. As the act contains an express declaration that no will shall be revoked except as therein provided, the birth of children is not a revocation of a devise executed after marriage, even when the presumption is fortified by circumstances. Marriage and the birth of offspring are likewise a revocation under the statute law of Missouri and South Carolina; and relief is also given in the latter State to afterborn children, and in the former to all children not named or provided for in the will, by letting them into the share of the estate which they would have taken in case of intestacy; while marriage with or without offspring is a statutory revocation in North Carolina and Rhode Island. *Wheeler v. Wheeler*, 1 R. I. 364; *Winslow v. Copeland*, 1 Buzby, 17. In Indiana, Illinois, and Connecticut, the subsequent birth of a child left unprovided for enures as a revocation; and the same effect follows in Ohio, Kentucky, and Virginia, if the testator had no children living when the will was made. *Evans v. Anderson*, 15 Ohio, N. S. 321; *Ash v. Ash*, 9 Id. 383. But in many



of the States of this country the doctrine of entire revocation has been laid aside as going beyond the evil which it was meant to relieve, and a partial intestacy introduced as a substitute for it, under which children not provided for by an antecedent will, take the interest in the real and personal estate of the testator which would have descended to them if he had died intestate. *Young's Appeal*, 3 Wright, 115, 119. Thus it is declared in Pennsylvania by the 16th section of act of April 13th, 1833, that a will executed by a single woman shall be deemed revoked by her subsequent marriage, and shall not be revived by the death of her husband; and, by the 15th section, that when any person shall make his last will and testament, and afterwards shall marry, and have a child or children not provided for in the will, and die leaving a widow, child, or children, every such person shall, as it regards the widow and the child or children afterborn, be deemed and construed to die intestate, and the widow, child, or children shall be entitled to such share or purpart of the real and personal estate of the deceased as if he had died without any will. Marriage or the birth of offspring is consequently a revocation *pro tanto* even when the testator has only a life estate, and the will takes effect as the execution of a power conferred by deed. *Edward's Appeal*, 11 Wright, 144; *Young's Appeal*, 3 Id. 115. In *Walker v. Hall*, 10 Casey, 483, and *Fransen's Will*, 2 Casey, 202, the court held that the rule prescribed by this enactment was an inflexible one, which could not be repelled by evidence of facts outside of the will, nor by any language used in the instrument itself raising a presumption that the testator made it in anticipation of his marriage or the birth of children, and did not intend either or both of those events to be a revocation. In *Walker v. Hall*, the devise was accordingly held to be revoked by the birth of a child, notwithstanding an express declaration that the testator gave all his property to his wife "in the fullest confidence that she would do her utmost to rear any child that might be born to them in the right way;" while, in *Fransen's Case*, the will was defeated by the marriage of the testatrix to the husband for whom it was intended to provide. On the other hand, in *Wheeler v. Wheeler*, 1 R. I. 364, a statutory revocation through marriage was held to be open to disproof by any evidence that would have been admissible for that purpose under the statute of frauds.

The legislation of New Jersey, Vermont, Delaware and Alabama is substantially the same with that of Pennsylvania, as it regards the issue, but there is no provision apparently for the wife who is thus in a less favorable position than under the statute, 1 Victoria, c. 26, which provides that a will shall be revoked by the occurrence of a subsequent marriage. In Virginia and Kentucky, afterborn children have the benefit of a similar enactment, where their birth does enure as a total revocation. The statutes of some of the States generalize

further, and passing from the presumption that the testator would have provided for afterborn children had he foreseen their existence, to the less founded supposition, that a failure to provide for existing children should be ascribed to oversight rather than design, declare in substance, that children who survive the testator without being provided for in his will, shall take as in case of intestacy, unless they have received their share of the testator's property in his lifetime, or the omission to provide for them in the will, shall appear to have been intentional. Such is the law in Massachusetts, Maine, New Hampshire, and Rhode Island, which thus grants relief to every child not named or provided for by the testator, whether born before or after the making of the will. *Warner v. Beach*, 4 Gray, 162; *Bancroft v. Ives*, 3 Id. 367. In New York, however, and as it would seem in Pennsylvania, the will of a married woman is not revoked wholly or *pro tanto* by the subsequent birth of children. *Cotheal v. Cotheal*, 40 New York, 405; *Walker v. Hall*, 10 Casey, 491.

It is a material question whether the statutes above referred to are exclusive of the common law presumption, or were merely intended to enlarge and define its scope and operation. The former view was taken in *Coates v. Hughes*, 3 Binney, 498, and a subsequent marriage followed by the birth of offspring, which defeated all the disposing clauses of the will, held not to revoke the appointment of the executors, or preclude them from making a good title under a power to sell for the payment of debts. Chief Justice Tilghman said, that if not expressed it was necessarily implied, that the intestacy should not be carried further than the provisions of the act of Assembly required. When the statute introduced a new and different rule, the common law was by an irresistible implication taken away. The same view was taken in *Young's Appeal*, 3 Wright, 115, and *Edward's Appeal*, 11 Id. 144, 153. The doctrine that marriage and the birth of issue are an implied revocation may, however, be presumed to be a part of the jurisprudence of this country, wherever it is not displaced by statute, and the law was so held in *Savage v. Mears*, 2 Robinson, Va. 570; *Vandenburg v. Vandenburg*, 1 Denio, 27; *Wilcox v. Rootes*, 1 Washington, 140, and *McCay v. McCay*, 1 Murphy, 447.

It was a fixed rule of English law from the period at which the power of devising was conferred by statute down to the 1 Victoria, c. 26, that a devise will be defeated by a subsequent conveyance of the land. 1 Rolle's Abridgment, 615, (Q) pl. 4, 5, 6, 616, R. pl. 2; *Arthur v. Bockingham*, 11 Modern, 157, Fitzgibbon, 233, 240; *Cave v. Holford*, 3 Vesey, 650; *Goodtitle v. Otway*, 7 Term, 399; 1 Bos. & Pul. 576; 2 H. Bl. 516; *Minuse v. Cox*, 5 Johnson's Chancery R. 441; *Skerrett v. Burd*, 1 Wharton, 246; *Jones v. Hartley*, 2 Id. 103. This rule holds good not merely where the estate of the deviser is divested by the deed,

but where it is confirmed or enlarged, as where a tenant for life or in tail levies a fine, or suffers a common recovery for the purpose of destroying contingent remainders or acquiring a fee simple; *Grant v. Bridger*, 3 Law R. Equity, 347; *Dister v. Dister*, 3 Levinz, 308; *Marwood v. Turner*, 3 P. W. 163; *Parsons v. Freeman*, 1 Wilson, 310; *Dailey v. Dailey*, 3 Id. 6; *Bennett v. Wade*, 2 Atkyns, 225; and even when the conveyance gives birth to a resulting use or trust, which is in all respects identical with that existing prior to the execution of the deed. Per Trevor, C. J., *Arthur v. Bockingham*, Fitzgibbon, 240, Rolle's Abridgement, 615 (2) pl. 1; *Grant v. Bridger*; *Dister v. Dister*; *Marwood v. Turner*; *Goodtill v. Olway*; *Parsons v. Freeman*. The only exception to a rule otherwise absolute, is that of a partition, made voluntarily by the parties who might have been compelled to it by writ. 8 Viner, 148, pl. 30; *Luther v. Kidby*, cited 3 P. W. 169; *Risley v. Dame Baltinglass*, T. Raymond, 240; *Duffel v. Burton*, 4 Harrington, 290.

A devise might even be revoked by a grant which failed for want of an attornment, or by a deed of bargain and sale not enrolled in accordance with the statute; Rolle's Abridg. Devise, 615; pl. 4, 5, 6; *Vauser v. Jeffrey*, 2 Swanston, 268, 274; *Shove v. Pincke*, 5 Term, 124; because, in the language of Lord Kenyon, a deed which is inadequate for the purpose for which it was executed, may still denote a change of mind amounting to a revocation.

It would, however, seem that an instrument which is inoperative as a grant cannot take effect as a revocation, unless it is executed in accordance with the requisitions of the statute, and is, moreover, within the general principle, that when the revoking purpose is subsidiary to the accomplishment of an ulterior design which is not fulfilled, it will not be allowed to take effect contrary to the true meaning of the testator (ante, 503).

A lease for years does not revoke a prior devise, because the possession of the tenant is that of the lessor, and the estate of the latter is unchanged; but a conveyance in fee will not be less effectual as a revocation, because the grantor reserves a fee farm, or ground rent with a clause of re-entry in case it is not paid; *Herrington v. Budd*, 5 Denio, 321; *Skerrett v. Burd*, 1 Wharton, 246; and the same result will follow from a lease for a long term of years renewable forever, with a right on the part of the lessee to extinguish the rent by the payment of a sum certain, because such a conveyance differs from an ordinary sale only in postponing the payment of the price. *Bosley v. Bosley*, 14 Howard, 390.

The rule is the same in chancery, and applies there as it does at law, even when the manifest effect is to disappoint intention. *Walton v. Walton*, 7 Johnson's Chancery R. 258. A devise of an equitable

estate may consequently be defeated by suffering a common recovery, for the purpose of rendering it effectual, or by a conveyance executed for a specific object although consistent with the provisions of the will, and accomplished before the death of the testator. *Sparrow v. Hardcastle*, 3 Atkyns, 798; 7 Term R. 416, n.; *Cave v. Holford*. The strict legal doctrine was enforced by Lord Hardwicke, in *Sparrow v. Hardcastle*, with uncompromising severity notwithstanding the hardship resulting from its application. "Where, after making a will," said his lordship, "the testator executes any legal conveyance, it is a revocation, because the estate is gone, and the will has lost the subject of its operation. In the case of *Lord Lincoln v. Rolls*, Equity Cases, Abr. 409, Edward, Earl of Lincoln, made a marriage settlement on a person whom he never married, or asked to marry him; though this was a conveyance made for a special purpose, and he was in of the old use it was determined by the House of Lords to be a revocation of his will. Nay, it has been carried so far, that where a man, after making his will, thinking he had only an estate tail suffered a common recovery to the use of this will, it was holden to be a revocation of it." A similar decision was made in *Locke v. Foote*, 5 Simons, 618, and a devise of an equitable estate held to be revoked, by suffering a common recovery for the purpose of obviating a supposed defect in the title of the deviser. The court said that any conveyance which operated as a revocation at law would have the same effect in equity, unless it was confined to the legal title or intended as a security for the payment of a debt.

Although chancery follows the legal rule, it will be guided by its own principles in making the application. Technically, a mortgage is a conditional conveyance which divests the estate, and leaves nothing but a bare right of entry in the grantor. It is, therefore, necessarily a revocation in a purely legal tribunal. In equity such a transfer is a mere security, which leaves the ownership of the mortgagor untouched, and will not therefore revoke an anterior devise. *Perkins v. Walker*, 1 Vernon, 97; *Chester v. Chester*, 3 P. Wms. 62; *Casborne v. Inglis*, 1 Atkyns, 600; *Baxter v. Dyer*, 5 Vesey, 656; *Mc Taggart v. Thompson*, 2 Harris, 149. And the better opinion would seem to be, that this is equally true of a conveyance in trust for the payment of debts. *Ogle v. Cook*, cited 1 Atkyns, 746; *Hall v. Dench*, 1 Vernon, 329; *Vernon v. Jones*, 2 Id. 241; *Brydges v. The Duchess of Chandos*, 2 Vesey, Jr., 428; *Gaines v. Wynship*, 2 Edwards, Ch. 571. The authority of these decisions was recognized by the Supreme Court of Pennsylvania, in *Hartley v. Jones*, 2 Wharton, 103, and they were followed by Chancellor Kent, in the case of *Livingston v. Livingston*, 3 Johnson's Chan. Rep. 148, and again in the Maryland Court of Appeals, in *Schilling v. Schilling*, 6 Gill, 171. On the other

hand, while a contract of sale works no change in the title to the land at law, it will be as effectually a revocation in equity as the most formal deed. *Cotter v. Layer*, 2 P. W. 622; *Rider v. Wager*, Ib. 332. Lord King said, that although a covenant for the conveyance of land is merely executory, and no revocation in a court of common law, the rule is different in equity, which looks upon what ought to be done as accomplished. Such an agreement effects an equitable conversion, under which the personal representatives of the vendor are entitled, in opposition to the heir or devisee. *Knollys v. Alcock*, 5 Vesey, 64; *Bennett v. Lord Tankerville*, 19 Id. 170; *Mayer v. Gowland*, Dickens, 563. It is, therefore, a revocation on general grounds, and aside from the technical rule above stated. The principle is the same, when the contract is by parol; *Brush v. Brush*, 11 Ohio, 287; *Rolan v. Shortridge*, 2 Blackford, 480; *Walton v. Walton*, 7 Johnson's Chancery, Rep. 269; *Dunohoo v. Lea*, 1 Swan, 118; *Blair v. Snodgrass*, 1 Sneed, 1; if it is reduced to writing or so far executed as to justify a decree for a specific performance notwithstanding the provisions of the statute of frauds. *Blair v. Snodgrass*. Accordingly, where the testator entered into a written agreement for the sale of the land, it was held to be a revocation, although the contract was rescinded subsequently, before his death. *Walton v. Walton*. The injustice of such a result is manifest, and under the statute law of New York and Missouri, a sale does not revoke a prior devise or prevent the estate from passing to the devisee; charged with the duty of making a conveyance on receiving payment from the vendee (post, 573).

It results from what has been said, that getting in an outstanding legal title, does not operate as a revocation. Rolle's Abridgment, 316, Q. pl. 3. A man will not, therefore, invalidate his will, by paying off a mortgage, and taking a conveyance or release from the mortgagee; and the principle is the same where a contract for the sale of land is consummated by the conveyance of the legal estate. *Smith v. Jones*, 4 Ohio, 113. It is obvious that the creation or extinguishment of a trust will not be a revocation so long as the equitable estate remains the same. When, however, the effect of such a severance or merger is to vary the equitable estate of the deviser, it will operate in the same way as an ordinary conveyance. A mortgage containing clauses or limitations which are not essential to secure the debt, and render the estate of the mortgagor different from that which he held before, will consequently invalidate a prior devise. *Howard v. Oglander*, 6 Vesey, 119; 8 Id. 106; *Plowden v. Hyde*, 9 Eng. Law & Eq. 238; 13 Id. 175. And a similar result will ensue, if the holder of an equitable interest accepts a transfer of the legal title, which works a substantial change in the ownership of the land. *Ward v. Moore*, 4 Maddox, 368; *Rawlins v. Burgis*, 2 Vesey & Beams, 332; *Plowden v. Hyde*. Accord-

ingly, where a vendee, under articles of agreement devised the land, and then took a conveyance to the usual uses to bar dower, it was held to withdraw the land from the operation of the will. *Bullin v. Fletcher*, 1 Keen, 369; 2 Mylne & Keen, 452.

A devise by a *cestui que trust* is not revoked by a change of trustees effected through a conveyance made at his instance. *Doe v. Potts*, 2 Douglas, 710. The point was decided the other way by Lord Nottingham, in *Ellon v. Harrison*, 2 Swanston, 276, note, but it would seem to be a necessary consequence of the principle that the equitable estate is the substance, the legal title a mere shadow. It is accordingly well settled, that a mortgagee has nothing that can pass by a devise, and it will make no difference that he takes a release of the equity of redemption subsequently to the execution of the will. *Ballard v. Carter*, 5 Pick. 112. So in *Bingham v. Winchester*, 1 Metcalf, 390, the entry of the mortgagee was held, not to bring the land within the reach of an anterior devise executed subsequently to the mortgage.

The grounds on which a devise is revoked by a conveyance of land vary not a little in their nature and operation, although sometimes treated as coming under one head. Thus a deed, which is wholly inoperative, may work a revocation by manifesting a change in the purpose of the testator, and showing that he intended the land to go in another direction instead of vesting the devisee. On the other hand, a conveyance which passes the whole estate, would necessarily invalidate a prior devise, even if the instrument itself remained in force. A conveyance may therefore preclude the operation of an anterior devise either by destroying the capacity of the devise to act on the land, or by placing the land beyond the reach of the devise. In the latter case, it operates as an ademption. In the former, as a revocation properly so called, and there are cases when it must be considered in both aspects in order to arrive at a satisfactory conclusion. A devise which had been revoked by a grant did not revive on a reconveyance of the land, because the devisor took a new estate which could not pass by an anterior will agreeably to the well settled construction of the statute. Rolle's Abridg. 616, (R.) pl. 1. But however true this might be of a reconveyance, it did not apply to a resulting use. Under these circumstances the grantor was in of his old estate, and it would vest in the devisee if the will were not revoked. This occurs whenever a feoffment, a fine, a lease and release, or other assurance operating by transmutation of possession, is executed without a consideration or recital to fix the use and prevent it from reverting to the donor. *Armstrong v. Woolson*, 2 Wilson, 19; *Harris v. The Bishop of Lincoln*, 2 Peere Williams, 135; *Pitts v. Lanford*, 1 Shower, 92. Accordingly, in *Cave v. Holford*, 1 Bos. & Pul. 576, 7 Term, 399, 3 Vesey, 650, it was contended with much force, that inasmuch as the settlement by lease and

release, which was relied on as invalidating the will had failed through the death of the deviser without issue, there was no sufficient reason why the resulting use which was identical with that which he had at the time of making the devise, should not pass in accordance with his manifest design. The point arose in *Goodtitle v. Otway*, 1 Bos. & Pul. 576, 3 Vesey, 659, in an issue sent from Chancery to the Court of Common Pleas; and Eyre, C. J., showed with his usual clearness that there was neither a revocation in the strict sense of the term as manifesting a change of purpose; nor such an alteration of the estate devised as to preclude the operation of the will. A majority of the court were, however, of opinion that the settlement revoked the will under the authorities. The words of the statute were, that a "man having lands" might dispose of them by will. The power was therefore confined to the very interest existing at the time. If a man made a conveyance to a use which failed, the fee simple would revest and he might be in of his old use; but it was another seisin. It could not, therefore, be said that the estate was the same that he had before making the conveyance. A devise was an appointment of a specific thing, and if that thing was otherwise dealt with, although immediately taken back into the same hand, the testamentary disposition was discharged and gone. See *Law v. Bridger*, 3 Law Rep. Eq. 347, 353. The judgment was affirmed by the King's Bench; and when the case came before Lord Loughborough for a final hearing on the reserved equity, it was decided in conformity with *Sparrow v. Hardcastle*, and against the validity of the devise. This conclusion which Lord Mansfield justly stigmatized as shocking, would be more intelligible if the subject were one where equity followed the law blindly and without distinction. But we have seen that the equity arising on a mortgage is within the scope of a prior devise, and there is no substantial difference between such a case and that of a resulting use. *Law v. Bridger*, 3 Law Rep. Eq. 347, 353.

The decisions in this country do not go so far, and may be explained on the principles advanced by Chief Justice Eyre in *Goodtitle v. Otway*, without the aid of the technical rule which was applied with such remorseless logic by the English courts. See *Law v. Bridger*, 3 Law Rep. Eq. 347, 352; *Adams v. Winne*, 7 Paige, 106.

It is universally conceded that if the testator parts with the whole estate in the land, by a subsequent conveyance, the devise will fail for want of a subject on which to operate. *Minuse v. Cox*, 5 Johnson's Chancery R. 441; *Skerrett v. Burd*, 1 Wharton, 246; *Hartly v. Jones*, 2 Id. 103; *Herrington v. Budd*, 5 Denio, 321; *Kean's Will*, 9 Dana, 25; *Arthur v. Arthur*, 10 Barb. 9; *Rose v. Rose*, 7 Id. 174; *Ross v. Carpenter*, 9 B. Monroe, 367; *Beck v. McGillis*, 9 Barb. 35; *Vandemark v. Vandemark*, 26 Id. 416; *McNaughton v. McNaughton*, 34 New York,

201; *Tanner v. Van Bibber*, 2 Duvall, Ky. 550. Under these circumstances, the devise is adeemed or frustrated rather than revoked. The same result will follow from a sale, although the contract is not executed by the delivery of a deed or the payment of the price. *Chambers v. Kerns*, 6 Jones' Eq. 280 (ante, 532). It will make no difference in the application of this principle that a rent is reserved in fee, or a bond and mortgage taken for the purchase money, because a gift of one estate or interest will not pass another of a different kind. *Adams v. Winne*; *Skerrett v. Burd*, 1 Wharton, 246. This was the point actually determined in *Skerrett v. Burd*, although the language of the court would seem to imply a recognition of the English doctrine. The statute of *quia emptores* is not in force in Pennsylvania, and it might be a serious question whether the rent reserved on a grant in fee is not as much a part of the old use as if the demise were for life. See 1 Smith's Leading Cases, 168, 6 Am. ed. But when this point was determined negatively, it was a necessary consequence that the rent did not pass by the anterior devise.

The revised statutes of New York declare "that every will that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." A similar provision exists in Pennsylvania, under which, after acquired land will pass by a general devise unless a contrary intent is manifested in the will; and statutes of a like kind have been enacted in many of the other States. It may be inferred that a general devise will not be revoked under this legislation by a subsequent conveyance of the testator's real estate, and that it will, on the contrary, pass any land which he may acquire subsequently before he dies. See *Pond v. Bergh*, 10 Paige, 140, 149; *McNaughton v. McNaughton*, 34 New York, 201. And the rule is presumably the same where the gift is of all the real estate which the testator may have in a particular place at his death. *Pond v. Bergh*. The effect of a conveyance on a specific devise is not so clear, but it should seemingly be governed by the general principle that a subsequent instrument will not revoke one of earlier date unless both cannot stand, and then only so far as the inconsistency extends (ante, 507). If the whole estate is conveyed, the devise will fail, and will not revive on a reconveyance; if only part, it may still take effect on the residue. The point was, however, decided differently in *Brown v. Brown*, 16 New York, 569, on the ground that the intention of the testator, as deduced from all the circumstances, was that the estate which he had taken back should pass by his will.

The subject is regulated in England by the statute 1 Victoria, c. 26, which declares that no subsequent conveyance not manifesting a re-



voking intention, shall prevent the operation of an anterior devise on any estate in the land which the testator may have the power to dispose of by will at his death. It may be presumed that a conveyance of land specifically devised would be revocation under this provision, and that the land would not pass under the will if reconveyed. And such is presumably the rule under the revised statutes of New York, which provide that "no devise shall be revoked by any subsequent act of the testator which shall have the effect to alter but not wholly to divest his estate or interest."

By the forty-fifth section of the same statute "an agreement to sell lands devised by a will previously executed shall not be a revocation of such a devise." In like manner a sale by a testator after making his will, of either land or personalty thereby devised, is not an ademption or revocation under the legislation of Kentucky unless so intended; and the burden of showing that such was the design is on those who seek to invalidate the will. *Wickliffe v. Preston*, 4 Metcalfe, Kentucky, 178.

Agreeably to the received interpretation in New York, the execution of a contract of sale by the delivery of a deed, takes the case out of the forty-fifth section of the statute of wills by operating as a complete ademption of the gift, and the devisee will not be entitled to the unpaid purchase money, although secured by a bond and mortgage taken at the time of the conveyance. The point was decided in *Adams v. Winne*, 7 Paige, 106; and the subsequent cases have followed in the track of that decision. *Beck v. McGillis*, 9 Barb. 35; *Vandenmark v. Vandenmark*, 26 Id. 416; *McNaughton v. McNaughton*, 34 New York, 201. The question was fully considered in *Beck v. McGillis*, where Harris, J., held the following language in giving judgment: "Previous to the adoption of the revised statutes the law in its strictness required that the interest which the testator had in the devise when he made his will should remain unchanged till his death. And the least alteration of such interest wrought a revocation of the devise. *Walton v. Walton*, 7 Johnson, Ch. 271. The effect of this rule was in many instances to defeat the intention of the testator. To obviate this result, and prevent a constructive repeal of the statute of wills, the Legislature, upon the recommendation of the revisors, changed the rule as it had previously existed in three special cases. It was declared by the forty-fifth section of the act relating to wills, 2 R. S. 64, that an agreement to sell lands devised by a will previously executed, should not be deemed to be a revocation of such devise. By the next section it was declared that a charge or incumbrance upon such lands created for the purpose of securing the payment of moneys or the performance of a covenant, should not work such revocation; and by the forty-seventh section it was declared in substance that no

devise should be deemed to be revoked by any subsequent act of the testator, which should have the effect to alter, but not wholly to divest his estate or interest. It is under this last provision of the statute that the learned counsel insists that the devise should be supported. This course depends upon the question whether by the transaction with Kirk the estate or interest of the testator was wholly divested? Regarding this as an open question, it is by no means free of embarrassment. The testator cannot, in an unqualified sense of the term, be said to have parted with all his interest in the lot. There is great force and plausibility in the argument that the transaction amounted to nothing more than a conditional sale. It is a familiar rule that when two instruments are executed, being parts of the same contract, they constitute but one act, and are to be construed and take effect together. It is upon this principle that it has been decided that when a deed and a mortgage for the purchase money are executed simultaneously, the wife of the purchaser is not entitled to dower as against the party claiming under the mortgage. *Stowe v. Tift*, 15 Johnson, 458; *Hollock v. Finney*, 4 Mass. 556. But even in the case of dower, where the question is raised *res integra*, I should always have considerable difficulty, independent of the equitable doctrine which gives to the vendor a lien for the purchase money without any mortgage, in maintaining the soundness of the position established by these decisions. The true nature of the transaction and the intent of the parties is, that the vendor shall divest himself of all his title in the premises sold, and that it shall be vested in the purchaser. On his part he became the debtor of the vendor. The one has changed his real property into a debt. The other has become invested with all the rights which the vendor had as owner of the property. As owner he may maintain trespass and defend his possession even against the mortgagee. His interest and not that of the mortgagee is liable to execution. He alone can convey a title, and his conveyance alone will vest an absolute title in his guarantee, subject only to being defeated by enforcing the lien of the mortgage. All the interest which the vendor has is in the payment of his debt."

"If this be so, if when the testator executed his deed to Kirk, and took back his bonds for the purchase money, secured by a mortgage on the premises, he retained no interest in the land; if his mortgage was to be regarded in the light of a chose in action, as but an incident attached to his debt, how can it be said that he was not wholly divested of his estate and interest in the property? The reform in the law relating to implied revocations, was undoubtedly much needed. Had the revisers applied to it a still bolder hand, I am inclined to think they would have rendered a still more valuable service. In the case before us there is very little reason to suppose that it was the design

of the testator, when he converted the lot he had devised to Mrs. McGillis into a bond and mortgage, that the security should take a different direction. But it is the office of a judge to declare the law strictly and truly as he finds it to be, and not to amend or improve it. It is not denied that but for the provisions of the statute noted, the transaction would have amounted to a clear revocation of the devise. The effect of the sale to Kirk, as I understand it, was not merely to alter, but wholly to divest the testator's estate and interest in the subject of the devise. With this view of the law I am bound to declare, though it may be, as there is reason to fear it will, defeat the testator's purpose, that the conveyance of the lot in the colony to Kirk, after the will was executed, was a revocation of the devise of that lot by the will, and that the bond and mortgage not having been effectually disposed of by the will, their proceeds, when collected, will be liable to be distributed by law."

It is not easy to discern why a sale should cease to be such within the meaning of the forty-fifth section of the revised statutes, upon the delivery of a deed and the execution of a mortgage for the purchase money. Such a construction obviously tends to defeat the purpose of the testator, and would seem not less opposed to the design of the Legislature, which was, that the price should, so long as it remained unpaid, take the place of the land, and go to the person to whom that was devised. *Powell v. Powell*, 30 Alabama, 668; *Welsh v. Pounders*, 36 Id. 668. This construction, accordingly, prevails in Alabama, where purchase money due at the death of the testator, vests in the devisee, notwithstanding the execution of a deed, unless a contrary intention appears on the face of the contract of sale, or by some other writing. *Welsh v. Pounders*.

Under ordinary circumstances, the effect of a deed as a revocation, is limited to the property conveyed, and it will not, therefore, invalidate the will in other respects, or render it inadmissible to probate. *Haves v. Humphrey*, 9 Pick. 350; *Carter v. Thomas*, 4 Maine, 341; *McRaney v. Clarke*, 2 Taylor, 278. When, however, a legacy is based upon a devise, the failure of the one may defeat the other, or render the whole will inoperative. *In re Cooper's Estate*, 4 Barr, 88. Accordingly, when the testator, after directing that his house should be sold, made various bequests to his children, a subsequent conveyance was held to revoke the legacies, because there was no other fund out of which they could be satisfied and that originally appropriated had been turned to another channel. *In re Cooper's Estate*. But this result will not follow where the legacy is demonstrative, and the land merely indicated as a means of payment; *Walton v. Walton*, 7 Johnson Ch. 258; 2 Leading Cases in Equity, 504, 3 Am. ed.; nor in any case where it is contrary to the intention of the testator, as gathered from the will. *Nooe v. Vannoy*, 6 Jones' Eq. 185.

## LICENSE.

## PRINCE AGAINST CASE.

In the Supreme Court of Connecticut.

JUNE, 1835.

[REPORTED, 10 CONNECTICUT, 375-383.]

*A house built and used as a dwelling by one man, on the land of another, on the faith of a license given by the latter, was removed by a subsequent purchaser of the land, against the will of the licensee. Held, that no damages could be recovered by the latter for the removal. There can be no recovery even in equity, in such cases as against a purchaser, unless he had full notice at the time of the purchase; and the mere possession of the licensee will not operate as notice.*

[\*This was an action of trespass, brought to recover damages for the demolition of a house. It appeared, at the trial, that the house had been built and used as a dwelling by one Prince, on land belonging to Dudley Case, on the faith of a license to that effect from the latter. Prince continued to inhabit the house until the period of his death, shortly before which he conveyed all his interest in the premises, by deed, to his son,—by whom the action was brought against the defendant, who had purchased the land after the decease of Case, from his heirs, at a sale ordered by the Court of Probate, and subsequently demolished the building. The jury found a verdict for the plaintiff, subject to the opinion of the court, on the questions of law arising on the above state of facts.]

WILLIAMS, C. J. The questions reserved are whether the plaintiff could recover anything; and if so, whether damages should be assessed upon the principle that he had a right to have the house remain on the land, or only had a right to remove it.

The plaintiff claims, that by putting the house upon the land

\* The syllabus and statement of the reporter are omitted.

of Case, by his consent, Prince remained the owner of it, with a right to have it remain there. It has been decided in Massachusetts and Maine that the house, or other building, remains the property of him who placed it there, and is personal property in him. *Wells v. Bannister*, 4 Mass. Rep. 514; *Marcey v. Darling*, 8 Pick. 283; *Ashmun v. Williams*, 8 Pick. 402, 404; *Curry v. Com. Ins. Co.*, 10 Pick. 540; *Ricker v. Kelly*, 1 Greenl. 117. In these States, it will be remembered, they have no court of chancery with ordinary chancery powers. This court, however, in *Benedict v. Benedict*, 5 Day, 464, 467, seem to have adopted the ancient common law doctrine that a *fixed and permanent* building erected upon another's land, even by his license, became his property; but if, in its nature and structure, it was capable of being removed, and a removal was contemplated by the parties, it was personal estate in the builder; and where the license was improperly revoked, resort must be had to a court of chancery. As the defendant in this case has not claimed the property in the building to be his, but has taken it down, and left the materials for the owner, it does not seem to be necessary for us to inquire whether the doctrine held in Massachusetts, or that adopted by a majority of this court in the case above cited, is correct. We need only inquire whether, if the plaintiff had a right to this building, the defendant was justifiable, under the circumstances of the case, in taking it down; in other words, whether the license to build, by *Dudley Case*, gave a right to Prince and his heirs and assigns to keep this house in that place. Was it an interest assignable, transmissible to heirs, and liable to be sequestered for his debts?

The plaintiff takes the affirmative of this proposition. He says it is a license executed, and therefore irrevocable. As a general rule, that proposition is correct. But it cannot be true, when some other principle of law is to be violated by such a construction. Thus, if a man authorize another to take away a certain dam, by which his land is flooded, and it is done, no attempt to revoke or alter its effect can be available. But it does not follow from this that if a license was given to erect the dam on the land of another, and continue it there for ever, the license to continue it would be irrevocable. If it did, it would be in the face of the statute which requires all conveyances of an interest in lands to be in writing. For a license, by which this dam could be continued in this place for ever, would be as effectual in that case as

a deed for the same purpose; and no case has been cited that goes this length. In *Web v. Paternoster*, Palm. 71, where license was given to put a stack of hay upon land, it was held, that it could not be countermanded until after a reasonable time had elapsed. This was, however, before the statute of frauds. In *Winter v. Brockwell*, 8 East, 308, where Lord Ellenborough recognized this principle, the plaintiff permitted the defendant to create a skylight over his own premises, through which he claimed a right to air and light; and Lord Ellenborough held that it was not countermandable, at least without placing the party in the situation in which he was before. In *Taylor v. Waters*, 7 Taunt. 374, it was held, that a ticket to the defendant and his assigns, for twenty-one years, to visit the theatre, was not an interest in lands within the statute; and a case is there cited (*Wood v. Lake*, Sayer, 3 S. C. Burrough's MSS. p. 36), that a license to stack coals on land for seven years cannot be revoked in three years. The case of *Liggins v. Inge*, 7 Bingh. 682 (20 Serg. & Lowb. 287), was also cited. The parties were both millowners on the same stream. The defendant cut down a bank on his own land, and erected a weir, by consent of the plaintiff's father, by which the water was diverted from the plaintiff's mill. Finding an injury to result, notice was given to the defendant to raise the bank as before, and a suit was brought. The court held that, as the plaintiff's father had in effect consented to this diversion of the water, he must be considered as having abandoned his right to have the water flow in that course, and could not complain. In these cases, it was held, that no interest was conveyed in the land; and in the last case, the court intimate a very decided opinion that, if that was attempted, the conveyance would be void. In one case, it is said that Lord Mansfield ruled that if a man stood by and saw another build on his land, he could not sustain an action of ejectment. 5 Term Rep. 556. This, however, has been sanctioned, it is believed, by no other judge. In *Matts v. Hawkins*, 5 Taunt. 23, Gibbs, J., doubted it; and it was holden by the Court of King's Bench, that, where a license was granted to erect a cottage on land of the lord, and it was actually erected, this was not a license, but a grant, which might be recalled immediately,—a mere permission to occupy. The *King v. Horndon-on-the-hill*, 4 Mau. & Selw. 562. And we know it is every day's practice, in such cases, to resort to a court of equity for redress, which would be entirely unnecessary, if Lord Mansfield's opinion was con-

sidered as law. And in the case of *Benedict v. Benedict*, 5 Day, 469, Judge Swift says, in such case the only remedy of the purchaser is in equity.

This subject is treated by Parker, C. J., in the case of *Cook v. Stearns*, 11 Mass. Rep. 533, 538, in a most satisfactory manner. "Licenses to do a particular act," says he, "do not, in any degree, trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land, for a particular purpose, and to enter upon it, at all times, without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by the statute.

But, whatever might have been the effect of this between the parties, here third persons are interested. The defendant has purchased this estate, without any notice of the plaintiff's claim. Had the plaintiff taken a deed from Dudley Case, and not recorded it, he could not have claimed against the defendant; and can he be in a better situation by a parol license than he would have been by a deed? The policy of our law is that titles to real estate shall appear upon record, so that all may in this way be informed where the legal estate is. But were this new code of conveyance to prevail, incumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would be fallacious guides; and when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word of honor of another to resort to that word of honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves to those who have faithfully used all legal diligence. If a loss is to be sustained, it is more reasonable that he who has neglected the means the law put into his power should suffer, rather than he who has used those means.

It is said, however, that notice is to be implied, because Prince's possession was notorious. But of what was this notice? That he was in possession; and of nothing more. It did not prove that he claimed title, or that he was other than the tenant of the owner of the farm. The purchaser, finding the possession of the

farm generally in the representatives of Dudley Case, and that the same was sold, under an order of probate, as the property of Case, was not bound to presume that a corner of the lot, occupied by Prince, was claimed by him as his property. If he examined the records, they showed that the whole farm had been conveyed, since such occupation, by Case, as his own. And such an occupation is surely very slight evidence of title.

The actual, notorious possession of real estate by a *bona fide* purchaser may, with other circumstances, be evidence against a purchaser or creditor that he had notice of the conveyance when he purchased, and so that his purchase was a fraud upon such possessor. But here no other fact exists tending to show any fraud upon him. Upon this simple fact no inference can be drawn.

Perhaps, however, it is not necessary to consider even these questions, because the license given in this case is not of the character claimed. It was a mere personal privilege, given to Prince, the elder, and never extended to his heirs or assigns. Now, if Case had put this into a deed, and granted him a license to erect a house there, for his use, surely the most that could be claimed would be an estate there for his life. It would not be assignable or transmissible to heirs. When, then, this license is given by parol, it imports just what men unskilled would think it imported. A good understanding existing between these two men, and the owner of the land being willing to have the other for a neighbor, instead of giving him a deed of land, which would authorize him to introduce any one he might choose, says, "You may build a place for you to live in." It is a personal privilege; and, without saying whether it is countermandable at the will of the owner or not, we have no hesitation in saying that it expires when he who is the object of it dies. The rule is, that "a license doth not extend but to him to whom it is given, and cannot be granted over." *The King v. Newton*, Bridg. 115; *Howes v. Ball*, 7 Barn. & Cres. 481 (14 Serg. & Lowb. 90).

In the case of *Jackson d. Hull v. Babcock*, 4 Johns. Rep. 418, where one Goodrich gave a license in writing to one Hitchcock to build a house about the pool at New Lebanon, and occupy it during his necessity or pleasure, and Hitchcock built a small house, and occupied it seventeen years, and then sold it to one Craigie, the court held, that Hitchcock had only a personal license or privilege



to inhabit, and had no title to the premises ; and that his sale to Craigie put an end to this privilege.

Here, Prince, the father, not only sold to the plaintiff, but both he and Dudley Case are dead ; and, unless this is an interest assignable or transmissible to heirs, it is extinguished.

If the right was then extinguished, perhaps no notice to remove the building was necessary. But if it was, the ejectment which has been brought, the recovery under it, and the possession taken, are sufficient notice that the defendant intended to resume his rights. More than a year after possession was taken under the ejectment had elapsed, and the plaintiff did not remove the building. This, surely, was a reasonable time ; and the defendant had as good a right to take away the building from his premises, as, in the case of *Web v. Paternoster*, before cited, he had a right to turn his cattle into a field where he had allowed the plaintiff to stack his hay, and a reasonable time had elapsed for him to take it away. *Palm. 71.*

The remaining question is, has he done this in a reasonable and proper manner ? The house might have been worth more to the plaintiff, had it been removed without taking it to pieces ; but the plaintiff had provided no place for it ; and, surely, the defendant was not bound to provide one, nor could he be bound to incur that expense.

It is not shown that the defendant has been guilty of any wanton destruction of the property, or any unnecessary injury, in taking it down. If not, and he had a right to remove it, it is not easy to see upon what principle he can be liable for any damages. Had he interfered with an attempt of the plaintiff to remove the building, a different question would have arisen. But, as the plaintiff neglected, for so long a period, to make this attempt, the defendant was justifiable in removing it himself.

The Superior Court are therefore directed to enter up judgment for the defendant.

The other judges were of the same opinion.

Judgment for defendant.

## RERICK AGAINST KERN.

IN ERROR.

In the Supreme Court of Pennsylvania.

SUNBURY, JUNE 21, 1826.

[REPORTED, 14 SERGEANT &amp; RAWLE, 267-272.]

*An executed license, the execution of which has involved the expenditure of money or labor, is regarded in equity as an executed agreement for a valuable consideration, and as such will be enforced, even when merely verbal, and relating to the use or occupation of real estate.*

[\*This was an action on the case, brought for diverting the water of a stream, and thereby injuring the plaintiff's mill. It appeared at the trial, that the water had been turned into the channel leading to the mill in question, by a structure erected for the purpose on the land of the defendant, under a license from him; and that he had subsequently removed this structure, and suffered the stream to return to its former course, which was the injury complained of. Evidence was given by the plaintiff for the purpose of showing that he had erected his mill on the faith of the authority given by the defendant, to divert the stream in such a manner as to furnish a supply of water, and that the revocation of this authority, would render the mill unserviceable, during a considerable portion of the year. Under these circumstances, it was contended that the license was irrevocable.]

The opinion of the court was delivered by

GIBSON, J. To the objection, that an action for diverting an ancient water course, is not supported by evidence of the removal of an artificial obstruction, it is sufficient to answer that, in the case before us, the right depends, not on the antiquity of the water course, but on the agreement of the parties; and the question, therefore, is, would equity carry this agreement into effect?

\* The syllabus and statement of the reporter are omitted.

That such an agreement may be proved by parol, was settled in *Le Fevre v. Le Fevre*, 4 Serg. & Rawle, 241, which, in this respect, goes as far as the case before us. The defence there was, that the right, being incorporeal, and therefore lying in grant, could pass only by deed. But as the agreement was for a privilege to lay pipes, it is evident that the right acquired under it was no further incorporeal than that which passes by the grant of a mine, or of a right to build, which indisputably vests an interest in the soil. A right of way, which has been thought to approach it more nearly, in fact differs from it still further. But the defence in this case is put on other ground, it being contended that a mere license is revocable under all circumstances, and at any time.

But a license may become an agreement on valuable consideration; as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract on payment of a compensation in damages, is consistent with no system of morals but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased; and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy. How very inadequate it would be in a case like this is perceived by considering that a license which has been followed by the expenditure of ten thousand dollars, as a necessary qualification to the enjoyment of it, may be revoked by an obstinate man who is not worth as many cents. But, besides this risk of insolvency, the law, in barely compensating the want of performance, subjects the injured party to risk from the ignorance or dishonesty of those who are to estimate the quantum of the compensation. In the case under consideration, no objection to a

specific performance can be founded on the intrinsic nature of the agreement, nor, having been partly granted, on the circumstances of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent.

A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed, or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights. But, having had in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right indefinite in point of duration, which cannot be forfeited by non user, unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view, as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a furnace, for instance, would be trivial, when weighed with the loss that would be caused by breaking up the business and turning the capital into other channels; and therefore a license to use water for a furnace would endure for ever. But it is otherwise where the object to be accomplished is temporary. Such, usually, is the object to be accomplished by a saw mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But, till then, it constitutes a right, for the violation of which redress may be had by action. With this qualification, it may safely be affirmed that expending money or labor, in consequence of a license to divert a water course or use a water power in a particular way, has the effect of turning such license into an agreement that will be executed in equity. Here it was not pretended that the license had expired; and we are unable to discover an error in the opinion of the court on the points that were propounded.

Judgment affirmed.

A license is essentially an authority or power, and therefore marked by the characteristics which are incident to the nature of powers, and by which their exercise is regulated. Among these is that of being essentially revocable and depending for continuance on the will of the person by whom they were created. *Smart v. Sandars*, 5 C. B. 894; *Fuller v. Dean*, 26 Missouri, 161; *Desloge v. Pearce*, 38 Id. 588; *Bartlett v. Prescott*, 41 New Hampshire, 493; *Chynoweth v. Tennery*, 10 Wisconsin, 397. Hence, a license, however formally and solemnly given, and even when put in the form of an instrument under seal, may be countermanded at pleasure, by the licensor; *Simpkins v. Rogers*, 15 Illinois, 397; *Woodward v. Sulez*, 11 Id. 157; *Ex parte Coburn*, 1 Cowen, 368; *Mumford v. Whitney*, 15 Wend. 380; and will necessarily terminate upon his death; *Ruggles v. Lesure*, 24 Pick. 187; *Carleton v. Reddington*, 1 Foster, 291, 306; *Johnson v. Carter*, 16 Mass. 443; *Carter v. Page*, 4 Iredell, 424; Lit. sect. 56; Coke, Lit. 52, b.; *DeHaro v. The United States*, 5 Wallace, 599, 627; *Hunt v. Rousmanier*, 8 Wheaton, 174. The licensor may, therefore, stop the licensee at any moment, and even after he has begun to act on the authority or permission; and the execution of part, will form no excuse for going on with the residue, after the sanction is withdrawn, which alone renders the act rightful. *Jameson v. Milleman*, 3 Duer, 255; *Tillotson v. Preston*, 7 Johnson, 285; *Pitman v. Poor*, 38 Maine, 237; *Ruggles v. Lesure*. Nor will it make any matter, that a license to enter, or do any other act on land, has its origin in a contract, or is otherwise founded upon a valuable consideration, unless those forms are pursued which are requisite to bind the land, and give the licensee an interest which is independent of the will or pleasure of the licensor; because the proper remedy lies in an action on the case, or of assumpsit, and not in persisting in a course which, though originally lawful, has become tortious. *Marston v. Gale*, 4 Foster, 176; *Wood v. Leadbitter*, 13 M. & W. 833; *McCrea v. Marsh*, 12 Gray, 211.

Another of the characteristics of a power, by which it is distinguished from the grant of an estate or interest, is its limitation to the person to whom it is given, and consequent insusceptibility of transfer or alienation. Licenses, therefore, are strictly confined to the original parties, and can neither operate for nor against third persons; *Foot v. The New Haven and Northampton R. R. Company*, 23 Conn. 214; *Desloge v. Pearce*, 38 Missouri, 588; *Wolf v. Forrest*, 4 Sandford Ch. 72; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Seidensparger v. Spear*, 17 Maine, 123; *Emerson v. Fiske*, 6 Greenleaf, 200; *Carleton v. Reddington*, 1 Foster, 291; *Harris v. Gillespie*, 6 New Hampshire, 11; *Ex parte Coburn*, 1 Cowen, 368; *DeHaro v. The United States*, 5 Wallace, 599. The law was so held in *Carleton v. Reddington*, and *Cowles v. Kendall*, 4 Foster, 364, and a license to flow the land of another, by building

a dam on the land of the licensee, held to be a mere power, which was strictly confined to the person to whom it was given, and could not be transferred by or with a grant of the land, on which it had been executed by the erection of the dam. The license in these cases was merely oral, but the principle will be the same when it is given by deed, if the intention be plain, to create a power or authority, and not to make a grant, or pass an actual estate or interest. *Hays v. Richardson*, 1 Gill & Johnson, 366; *Wood v. Leadbitter*, 13 M. & W. 838, 845; *Webb v. Walker*, 7 Casey, 46. Thus, in *Jackson v. Babcock*, 4 Johnson, 418, a permission to erect a house on the land of the defendant, and occupy it as long as the licensee thought fit or his convenience might require, without molestation, was held to be a mere power which could not be transferred to a third person, even after it had been acted on by building the house; while the case of *Vandenburgh v. Van Bergen*, 13 Johnson, 212, determined, that a license to build a dam at any point on the course of a stream which the grantee might select, gave a mere right of choice or selection which might have been converted into an interest, by an election made in due season, but which terminated on the death of the licensee, and could not be exercised by his heirs or assignees. The court cited and relied on Coke, Lit. 45, a, and *Heyward's Case*, 2 Reports, 36, a, b, that, where the election is a condition precedent, it must take place while the parties are still alive, because the power is a naked one until the choice is made, and can neither be exercised by a third person, nor after it has been brought to an end by the death of the donor. A power coupled with an interest, however, obeys a different rule, and may descend or pass to executors or heirs.

It is equally well settled, that the operation of a power is limited to the donor, and that, even when binding on him, it will not be so on third persons; or, in other words, that an authority given by one man cannot be pleaded or given in evidence as a bar to the right or title of another. *Riddle v. Brown*, 20 Alabama, 412; *Yeakle v. Jacob*, 9 Casey, 376. Hence, it may be laid down as a general principle, that the conveyance of land will extinguish every license or authority which may have been previously given by the grantor, not only as working an implied revocation of the power, but by determining the interest on which it was to operate, and without which it must necessarily fail. *Hays v. Richardson*, 1 Gill & J. 366. The law was so held in *Harris v. Gillespie*, 6 New Hampshire, 9; *Cook v. Stearns*, 11 Mass. 533; *Stevens v. Stevens*, 11 Metcalf, 251; *Bridges v. Purcell*, 1 Dev. & Bat. 492; and *Foot v. The New Haven and Northampton R. R. Co.*, 23 Conn. 214; which show that the license is revoked by the conveyance, and would be ineffectual, even if it were not, because the estate of the grantor is at an end, and the grantee cannot be bound by an authority which he never gave. *Wallis v. Harrison*, 4 M. & W. 538; *Perry v.*

*Fitzhowe*, 8 Q. B. 757. These cases are sustained by *Harris v. Gillespie*, where a license to build and inhabit a house on the land of the licensor, was held to be void against a subsequent purchaser, even if binding on the person by whom it was originally given; and the same point was decided in *Seidensparger v. Spear*, 17 Maine, 123; *Whittaker v. Cawthorne*, 3 Devereux, 387; and *Carler v. Harlan*, 6 Maryland, 29.

We have seen that a power is ordinarily revocable even when it is sustained by a consideration or conferred by an instrument under seal (ante, 550). *Dodge v. McClintock*, 47 New Hampshire, 483; *McCrea v. Marsh*, 12 Gray, 211. But it is not always easy to determine whether the operation of a contract is confined to the grant of a license, or extends to the creation of an estate or interest, *Hunt v. Rousmanier*, 8 Wheaton, 174, 1 Peters. In construing deeds and writings phraseology is chiefly important as a guide to intention, and the design of the parties as disclosed by the whole instrument, will not be allowed to fail because they have used words in ignorance of their technical meaning, or that would have been more appropriate to another end. 2 Smith's Leading Cases, 521, 6 Am. ed. A license may obviously approach nearly to a grant, because one mode of giving is to authorize the donee to take. 3 Leading Cases in Equity, 350, 3 Am. ed. Accordingly, in *Muskett v. Hill*, 5 Bing. N. C. 694, an indenture authorizing certain persons therein named, to search for and raise minerals and convert them to their own use, was held to confer an interest in the nature of an easement, which was capable of being assigned and might be made the foundation of a recovery in case. The distinction was said to be between a personal license of pleasure, and a license of profit, the former being confined to the individual, while the latter might be exercised through his servants or agents. In like manner, where A. and B. conveyed land by indenture to D., (who joined in the deed) reserving to A. B. and C., their heirs and assigns, liberty to come into and upon the lands and there hunt, fish, and fowl, the reservation was held to operate as a grant of a profit *à prendre* which C. might exercise personally or through others. The court cited and relied on the case of *The Duchess of Norfolk v. Wiseman*, from the year books, 12 Henry, 25, and 13 Henry, 7, Pl. 2, where a license to hunt at pleasure on the land of the licensor was held a justification for the entry of the defendant as the servant and companion of the licensee, and it was said that if I give a man permission to eat with me or to go into my orchard, it is a license of pleasure, but if I give him leave to have a tree in my wood, his servants may enter and cut down the tree, because their act is a means whereby he obtains the profit which the license was designed to confer. *Wickham v. Hawker*, 7 M. & W. 63, 76; *Doe v. Wood*, 2 B. & Ald 724.

In *The Johnson Iron Co. v. The Cambria Iron Co.*, 8 Casey, 241,

a grant of the privilege of raising iron ore, was in like manner held to be an incorporeal hereditament, and not a license that might be recalled. When, however, the language of the instrument plainly shows that the intention was to confer an authority, and not to vest an interest, the words will not be wrested from their true import in order to further the ultimate design which the parties had in view in executing the deed. Accordingly, in *Hunt v. Rousmanier*, 8 Wheaton, 1 Peters, the court held that a power of attorney authorizing the sale of a vessel belonging to the donor, and the application of the proceeds to the payment of a debt due by him to the donee, could not operate as a mortgage or assignment, although the effect of interpreting it merely as a power, was the loss of the security which the instrument was intended to create.

The doctrine that a power may be recalled at the pleasure of the donor, ceases to be applicable when the power is coupled with an interest, or is necessary to the possession or enjoyment of a right or title, arising from the act or contract of the person who creates the power. Under these circumstances, the power is a mere accessory or incident, and will not only cease to be revocable (*Walsh v. Whitcomb*, 2 Espinasse, 565; *Watson v. King*, 4 Campb. 272; *Garrison v. Morton*, 10 B. & C. 731; *Doe v. Wood*, 2 B. & Ald. 274; *Bromley v. Holland*, 7 Vesey, 3; *Boults v. Mitchell*, 3 Harris, 371, 379; *Bourney v. Smith*, 17 Illinois, 531; *Beattie v. Butler*, 21 Missouri, 313) but may pass by the transfer or alienation of the interest to which it is attached. *Muskett v. Hill*, 5 Bing. N. C. 694; *Congreve v. Evetts*, 10 Exchequer, 298. It is not necessary, to produce these results, that the interest should be in the thing which forms the subject matter of the power; they will follow, from every act or engagement which gives the donee an interest in its continuance, and makes it the duty of the donor not to recall that which he has given. *Wood v. Manley*, 11 A. & E. 34. "As the power of one man," said C. J. Marshall, in *Hunt v. Rousmanier*, 8 Wheaton, 174 (ante, vol. 1), "to act for another, depends on the will and license of the other, the power ceases when the will or permission is withdrawn. But this general rule, which results from the nature of the act, has sustained some modification. When a letter of attorney forms part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, and if not so, is deemed irrevocable in law. Although the letter of attorney depends, for its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, or in terms, or by the nature of the contract, not to change his will, the law will not permit him to change it." And the court were consequently of opinion, that the power to sell, given by the instrument in question, could not have been



revoked by the donor during his life, because the donee had an interest in the proceeds of the sale, although he had none in the thing sold. In like manner, although a submission to arbitration is *prima facie* a power, and may consequently be revoked at any time before it is executed, yet this ceases to be true, when it is the result of a contract, or when the circumstances are such that it cannot be recalled without injustice. *McGheeheh v. Duffield*, 5 Barr, 497.

A power will, it has been said, necessarily terminate on the death of the donor, even when he is precluded from revoking it during his life, unless the donee has an interest in the thing on which the power is to operate, and not merely in the execution of the power. *Watson v. King*, 4 Campbell, 272; *Hunt v. Rousmanier*, 8 Wheaton, 174. It has been held to follow for a like reason, that acts done after the death of the giver of the power, will fail even as it regards third persons, who have no reason to suppose that he is not still alive. *Travers v. Crane*, 15 California, 12; *Ferris v. Irving*, 28 Id. 645 (ante, vol. 1). But in *Ish v. Crane*, 8 Ohio, N. S. 520, 13 Id., this latter point was decided differently, for reasons which merit consideration. See *Cassaday v. McKenzie*, 4 W. & S. 282, 285 (ante, 361).

It follows from what has been said, that a license will lose its revocable character, whenever it is coupled with the grant of an interest, or when an interest exists, which depends upon, or cannot be enjoyed without the aid of the license. It is not essential that the interest should be in the thing to which the right given by the license relates, or on which it is to be exercised; all that is necessary to deprive the donor of the power of revocation is, that he should have conferred, or that the licensee should possess some estate or interest which depends on the continuance of the license, and which cannot be enjoyed if it be withdrawn, or terminated. Hence, the sale or gift of a chattel, which is situated on the land of the vendor or giver, implies a right to enter, for the purpose of removing it, which cannot be recalled; and the same result will follow, when the interest grows out of the execution of the license, as when game is killed, or standing timber felled, on the faith of a permission from the owner of the soil; because the woodsman in the one case, and the sportsman in the other, has a right to the fruits of his exertions, and should have a reasonable time and opportunity to remove them to some place where they may be enjoyed. *Mumford v. Whitney*, 15 Wend. 380; *Pierrepoint v. Barnard*, 5 Barbour, 364, 2 Selden, 279.

In like manner, if trees are sold without the land on which they stand, or reserved while the land itself is granted, the grantor in the latter instance, and the grantee in the former, will have an implied power to enter, fell, and take away the trees. *Boults v. Mitchell*, 3 Harris, 371, 379. And in *Boults v. Mitchell*, the court held, that an

abuse of the authority by felling timber, not comprised in the grant or reservation, will not render the authority void *ab initio*, or render the wrongdoer liable in an action of trespass *quare clausum fregit*.

The rule and the exception were stated with admirable clearness, by Chief Justice Vaughan, in *Thomas v. Sorrel*, Vaughan, 330, 351, 1 Levinz, 217, in the following language, which was cited and approved by Baron Alderson, in *Wood v. Leadbitter*, 13 M. & W. 844: "A dispensation or license, properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which, without it, had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after, to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licenses; but it is consequent, necessarily, to those actions, that my property may be destroyed in the meat eaten, and in the wood burnt. So as, in some cases, by consequent, and not directly, and as its effect, a dispensation or license may destroy and alter property."

"Attending to this passage," said Baron Alderson, in commenting upon it, in *Wood v. Leadbitter*, "in conjunction with the title 'License,' in Brooke's Abridgment, from which, and particularly from paragraph 15, it appears that a license is in its nature revocable, we have before us the whole principle of the law on this subject. A mere license is revocable, but that which is called a license, is often something more than a license; it often comprises, or is connected with a grant, and then the party who has given it, cannot, in general, revoke it, so as to defeat his grant, to which it was incident." And he went on to say, "that a license by A. to hunt in his park, was revocable, whether given by deed or parol, and merely renders the act of hunting lawful, which, without the license, would have been unlawful. But that, if the license, as in the case put by Chief Justice Vaughan, was a license not only to hunt, but to take away the deer when killed, as the property, or for the use of the licensee; then, if the grant of the deer was good, the license would be irrevocable, because the person who gave it would be estopped from defeating his own grant." These principles are indisputable, and they will apply wherever the circumstances are such as to create an equitable estoppel, and preclude the right to recall a license, by rendering it essential to the enjoyment of property, which has grown out of the acts of the licensor, or has been placed, with his sanc-

tion, and in reliance upon an authority or permission given by him, in a position where it would be lost or endangered if the license were withdrawn. This appears from the case of *Wood v. Manley*, 11 A. & E. 34, where a tenant, who had agreed that certain hay, which had been purchased under a levy and sale by his landlord, might remain on the premises until the following Ladyday, and that the purchaser might enter at any time before Ladyday for the purpose of removing it, subsequently refused to permit the hay to be removed, and fastened the gate leading to the close where it was situated. The defendant broke open the gate and removed the hay, which gave rise to the question, whether the license was irrevocable, and might be acted on, notwithstanding the refusal of the tenant. The court gave judgment for the defendant, on the ground that the permission to leave the hay on the land, and to enter subsequently for the purpose of taking it away, was given under circumstances which precluded the right to withdraw it; and Lord Denman asked whether if a man bought a loaf from a baker, and left it in the shop on the faith of a promise that he might call for it afterwards, the baker could change his mind and prevent the purchaser from returning to obtain the loaf. This view is sustained by the earlier authorities, which show that the common law remedy of recaption may be exercised by an entry on the land of another, for the purpose of regaining possession of a chattel which was brought there with his consent, or even accidentally without any negligence or default on the part of the owner. *Patrick v. Colerick*, 3 M. & W. 483. It was held, in like manner, in *Hewett v. Johnson*, 7 Exchequer, 75, on the authority of *Liford's Case*, 11 Reports, 57, b, that, although the exception of standing timber from a parol lease, could not take effect as a grant or reservation, it was, notwithstanding, valid as a license, and justified an entry for the purpose of cutting the trees down, and removing them. The principle was carried to its fullest extent, in *Pierrepoint v. Barnard*, 5 Barbour, 364; 2 Selden, 279; which decides that the execution of a license to enter and cut down timber, confers a vested interest, which cannot be recalled, and may be pleaded as a justification by the licensee, or those claiming under him by purchase. A similar view was taken in *Nettleton v. Sikes*, 8 Metcalf, 34, where the question arose under circumstances very similar to those suggested by Chief Justice Vaughan. An agreement had been made, by which the defendant was to cut down and cord certain oak trees growing on the land of the plaintiff, and receive the bark in payment. After the trees had been cut down and corded, on the faith of this agreement, and the bark stripped off, the plaintiff prohibited the defendant from removing it, and brought trespass against him, for disregarding the prohibition. The court held, that although the license was essentially revocable when first given, it acquired a different character when executed, and

could not be recalled to the injury of the licensee. This case was followed in *Heath v. Randall*, 4 Cushing, 5, and a grantor held entitled to enter on the land which he had conveyed, in order to regain possession of chattels which he had left there, under an agreement that if they were not paid for, the right of property should revert in him. This case obviously goes to the full extent of the proposition, which may, perhaps, also be deduced from the dicta of Lord Denman, in *Wood v. Manley*, that every man, who brings the goods of another on his own land, or permits the owner to leave them there for safe keeping, gives the latter an implied authority to enter for the purpose of taking them away, which will be upheld by the interest to which it is subsidiary, and cannot be revoked.

It is, however, necessary to remember that, as this principle is, in some respects, exceptional, and contravenes the right which every man has to the exclusive dominion over his own property, those who rely upon it, must take care to bring themselves within its operation, and that it will not be enough to aver, that they went upon the land for the purpose of removing goods or fixtures, without showing how the goods came to be on the land, and that the circumstances were such as to justify the entry. *Anthony v. Haney*, 8 Bing. 186; see *Heermance v. Vernoy*, 6 Johnson, 5.

It is moreover plain, that to sustain a power by an interest, some interest must exist on which the power can be based, and which is of a nature to give it the vitality and endurance, which form no part of its original attributes. Hence, in order to know whether a power is irrevocable, in consequence of its being founded upon or subsidiary to an interest, we must look beyond the doctrine of powers to the rules by which the law regulates the creation and transmission of property, for, unless these are satisfied, no interest can arise, and the power will be a naked one, revocable at pleasure. This is peculiarly true when real estate is in question, which has been surrounded from the earliest periods with restrictions intended to give certainty and security to title, and protect the kind of property which is most valued against the hazard and uncertainty of parol evidence. The deliberation and publicity attendant on livery of seisin, were essential at common law, to the gift or assignment of estates in possession, while the solemnity of an instrument under seal, was equally necessary for the transmission of those which lay in grant, or to render a release of an outstanding right effectual. Chancery, indeed, held, that a use might arise out of the payment of a valuable consideration, without the aid of a deed or writing; and hence a bargain and sale of land would have stood very nearly on the same footing under the statute of 27 Henry VIII., c. 10, for transferring uses to possession with that of a chattel, had not the statute of enrolments, 27 Henry VIII., c. 16, remedied the evil a few

months afterwards, by requiring that every bargain and sale should be by a deed enrolled in one of the courts of record at Westminster, or before the *custos rotulorum* and two justices of the peace, within six months after its execution. The law was thus brought back to the point from which it had set out, except that a deed sealed and delivered, might be substituted under the statute, for the symbolical delivery of the land itself, which had once been essentially requisite, when the estate was of freehold, and in the possession of the grantor. This result, however, followed solely from the statute of enrolments, and not from the nature of uses, or the construction of the statute by which they were reduced to possession; and hence, a valid bargain and sale might have been made until very recently, in England, by parol in those cities, towns, and boroughs, where the mayor, recorder, or chamberlain, had authority to enrol "evidences, deeds, or other writings," which were expressly exempted from the operation of the statute of enrolments. 2 Smith's Leading Cases, 526, 6 Am. ed.; *Busher v. Thompson*, 4 C. B. 48, 60. Strictly speaking, this exception should be the rule in those parts of the United States, where the statute of enrolments is not in force, and no act of a like kind has been passed to fill its place; but the courts and the profession have, by tacit consent, held sealing and delivery essential to the transmission of an estate of freehold in land. *Jackson v. Wood*, 12 Johnson, 73; *Jackson v. Wendell*, Ib. 355; *Beardsly v. Knight*, 4 Vermont, 471; 4 Kent's Com. 451. There is probably no State in the Union where a parol bargain and sale would be held valid at law, whatever the effect might be in equity. Moreover, even if an estate in land could be transferred by a parol bargain and sale, a deed would still be requisite for the creation of an easement, because the statute of uses cannot operate unless there is a seisin to feed the use; and if a man can be seized of a way, or water course, to the use of another, which seems doubtful, he certainly cannot be so until the way has been granted, or the right to the water course actually created. *Beaudely v. Brooke*, Cro. Jac. 189; *Hays v. Richardson*, 1 Gill & J. 366; Cornish on Uses, 116, 117; Gilbert on Uses, 181; Bacon's Abridgement, Uses, F. The matter consequently stands as it did at the common law, which required a seal whenever an incorporeal hereditament was in question; and an attempt to charge land with the burden of a way or other easement, otherwise than by deed, will consequently fail, from the insufficiency of the means employed, if the question arises at law, and is determined on strict legal principles.

An additional safeguard was moreover given by the statute of frauds, under which no uncorporeal or incorporeal hereditament can be granted or assigned without a writing signed by the party to be charged.

It follows that no easement or charge on land can be created by an

oral license, even when the intent is plain, because the parties choose to rest satisfied with unwritten evidence, while the law requires a writing signed and under seal. *Comb v. Burke*, 2 Hill's S. C. 534. When there is a consideration, equity may dispense with a seal as being merely technical and formal, but a writing is indispensably requisite under the provisions of the statute whenever an estate or interest in land is to be affected, unless the circumstances are such that a refusal to execute the agreement would operate as a fraud. And as this legislation was remedial, with a view to prevent fraud and secure the evidence of title, it will be so construed as to preclude any attempt to do that by indirect means which the Legislature have forbidden to be done directly. Title is the right to possession and enjoyment, and an irrevocable authority to possess and enjoy is virtually a title. If I can use the land of another for a purpose of my own under an authority which he cannot recall, the ownership is relatively to that purpose in me and not in him. To give an oral license an effect which is denied to a contract, is therefore virtually to abrogate the statute of frauds. *Desloge v. Pearce*, 38 Missouri, 560; *Houston v. Laffee*, 46 New Hampshire, 505. These principles are so plain as to be indisputable at law, and the only question is, how far they should be modified by equity. A chancellor may control the words of the statute in order to prevent it from being used as a cover for the commission of the frauds which it was meant to suppress (1 Story's Equity, sect. 330); but the power to do this belongs solely to equity, and cannot be exercised by a common law tribunal, without confounding jurisdictions, which have hitherto been kept separate, and depriving the defendant of the benefit of his own oath, in answer to the allegations made against him. *Wolf v. Frost*, 4 Sandford, Ch. 72; *Desloge v. Pearce*, 38 Missouri, 588. And in *Sandford v. Frost*, the court said that was no middle ground between a license and an easement. If it was an easement, the grant must be in writing under the statute of frauds; if a license, it could not descend or be transferred, and was revocable at pleasure by the grantor.

The rule which renders a license, coupled with an interest or sustained by the passage of a consideration, irrevocable, and makes it co-extensive with the right or contract, here comes in conflict with other and more stringent principles, and must yield to their influence. Thus, an authority to enter, for the purpose of removing hay from the land of another, may be irrevocable, under the authority of *Wood v. Manley* (ante, 555), if coupled with an interest in the hay; but a license to keep or stack hay on the land of another is clearly within the statute of frauds, and the rule by which the common law regulates the creation of easements, and may consequently be revoked at any moment by the licensor, because the one is virtually an interest in the land, while the other merely involves a right to enter upon the land for a specific pur-

pose, and when once exercised, will be wholly gone. And for a like reason, an authority to work a mine or to quarry and remove stone, is an interest in land, and must, in order to confer a permanent or vested interest be given in writing and signed by the party to be charged. *Desloge v. Pearce*, 38 Missouri, 588.

"That no incorporeal inheritance, affecting land," said Baron Alderson, in *Wood v. Leadbitter*, 13 M. & W. 837, 845, "can either be created or transferred, otherwise than by deed, is a proposition so well established, that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in grant, and not in livery, and to pass by mere delivering of the deed. In all the authorities and text-books on the subject, a deed is always stated or assumed to be indispensably requisite.

"And although the older authorities speak of incorporeal inheritances, yet there is no doubt but that the principle does not depend on the quantity of interest granted or transferred, but on the nature of the subject matter: a right of common, for instance, which is a profit *à prendre*, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years, without a deed, than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into, and through, and to remain in, a certain close belonging to Lord Eglintoun; to go and remain where, if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land, at least, as obviously and extensively as a right of way over the land—it is a right of way and something more: and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created, otherwise than by deed."

A different view was taken in some of the earlier cases, and the purchase of a season ticket at a theatre, from an agent, held to give an irrevocable right to enter and remain during the performance; *Taylor v. Waters*, 7 Taunton, 374; while in *Wood v. Lake*, Sayer, 3, a contract, that the plaintiff should be entitled to stack coal on the defendant's premises, for the term of seven years, was held to be valid, although the contract, in the one case, and the authority of the agent in the other, was merely oral, and not in any way evidenced by, or reduced to writing.

But these decisions, which have never been recognized as law in this country, were overruled in England by the case of *Wood v. Leadbitter*, 13 M. & W. 837, where the question arose, as it had done in *Taylor v. Waters*, out of the purchase of a ticket of admittance, issued by the defendant, for a valuable consideration paid by the plaintiff, which gave rise to the argument, that the license was coupled with, and sup-

ported by, an interest, and could not be recalled by the licensor, contrary to the agreement. But the court were of opinion that, although a license founded upon, and necessary to the enjoyment of a grant, will be sustained by the interest given, yet this is only true where there is a valid grant, and does not apply to an oral license, which would be equivalent, if executed, to an estate or easement in the land to which it relates, or which falls within its operation. "It may further be observed," said Alderson, Baron, in delivering the opinion of the court, "that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and it is therefore revocable. Thus, a license by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice Vaughan, a license not only to hunt, but also to take away the deer, when killed, to his own use, this is in truth a grant of the deer, with a license annexed to come on the land: and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a water course, to flow on the land of the licensee. In such a case there is no valid grant of the water course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the water course; and if it did, then the license would be irrevocable." And he went on to hold that, as the right which the ticket purported to give, of entering on the race course, and remaining there during the continuance of the races, was virtually an easement which could not be granted without a deed, the license was not sustained by an interest, and might, consequently, be revoked at any time. This decision was followed in *McCrea v. Marsh*, 12 Gray, 211, and the sale of an opera ticket said to be a grant of a license which might be revoked, and the purchaser excluded from the house, without exposing the manager to a liability in tort.

The cases therefore establish that, although a contract for a license, or a license given in pursuance of a contract, will be irrevocable, under ordinary circumstances, yet, that this ceases to be true when land is in



question, unless the contract takes effect as a grant, and is capable of passing the thing granted. *Selden v. The Delaware Canal Co.*, 29 New York, 634; *Comb v. Burke*, 2 Hill S. C. 534. The same point was decided in *Taplin v. Florence*, 10 C. B. 744, where the authority conferred by the employment of an auctioneer to sell goods in a dwelling house, was held to be essentially revocable, so far as the house was concerned, even after the sale had been made, and consequently to be no justification for his refusal to leave the premises after it had been revoked, because the express or implied contract between the parties gave no interest in the land, and there was no interest in the goods which could bring the case within the authority of *Wood v. Manley*, (ante, 555,) and justify a continuance on the premises during a reasonable period, for the purpose of delivering or taking them away. These cases are fully sustained by the American authorities, which show that a license to enter on land cannot be rendered irrevocable by an express or implied agreement not to revoke it, unless some vested interest is shown to exist, which would be sacrificed or prejudiced if the license were withdrawn. *McCrea v. Marsh*, 12 Gray, 211; *Marston v. Gale*, 24 New Hampshire, 176; *Houston v. Laffee*, 46 Id. 505. In *Taplin v. Florence*, Jervis, C. J., said, that the interest must be an interest in the thing to which the license extends, which might seem to imply that a license to enter on land cannot be upheld by an interest in goods which are upon the land, or by anything short of a right or title to the land itself. But this would be directly at variance with the cases of *Wood v. Manley*, and *Patrick v. Colerick* (ante, 555), as well as with the language of Chief Justice Vaughan, in *Thomas v. Sorrell*, which shows that a right of property in a deer or other chattel, will sustain a license to enter on land, and that all that is needed to make an interest a bar to the revocation of a license is, that such a connection should subsist between them, that good faith will not permit the one to be revoked, to the injury or destruction of the other.

•The rule which renders a license subsidiary to an interest, irrevocable, as long as the interest continues, will hold good in every instance, where the property of one man is placed on the land of another, with his permission; and has been held, in this country, to reach beyond movable chattels, and embrace houses, or other structures of a permanent character, erected on the faith of a promise, that the builder should not loose the fruits of his money or labor, in consequence of the want of a title to the ground on which the building is placed. And traces of this same doctrine may be discovered in England, although it is applied with much less liberality there than in the United States. •

The common law held, that whatever was affixed to the soil, became part of the inheritance, and the only exception seems to have been where fixtures were erected by the tenants of particular estates, under

circumstances which denoted an intention to remove them during the continuance of the estate, or at its termination. 2 Smith's Leading Cases, 282, 6 Am. ed. But the limits of this exception have been gradually extended, and it would now seem well settled, even in England, that barns, sheds, or other structures of a substantial character, may be treated as personal property, and removed from the land by the person to whom they belong, if they are of such a nature that they can be taken down without disturbing the soil or otherwise injuring the freehold, although placed upon stone or brick foundations, which are firmly imbedded in the soil, and must be left when the superstructure is removed. *Rex v. Otley*, 1 B. & Ad. 161; *Wansborough v. Maton*, 4 A. & E. 884. Many of the cases in which the point occurs are between landlord and tenant, and influenced by considerations drawn from the limited interest of the person by whom the building was erected; but this cannot be said of *Rex v. Otley*, where the demise of a mill, was held not to pass the ground on which it stood, because it was not annexed or fastened to the foundation, although the foundation was built into the soil. And the case of *Wood v. Hewett*, 8 Q. B. 913, shows that the principle is independent of tenure, and may apply as between strangers. In these instances, however, the character of the building, or the manner in which it was placed on the land, indicated that there was no intention to annex it permanently to the inheritance, and they would hardly be followed by an English tribunal, where this characteristic was wanting. But the American courts have been disposed to pay less attention to the nature of the structure, and more to the intention of the parties, as disclosed by the evidence. The doctrine that a house or other permanent fixture may be built on the land of another, without becoming part of the freehold, was propounded at a comparatively early period, in *Wells v. Banister*, 4 Mass. 514, and has been recognized and applied in a number of cases, which establish, that a house erected on the land of another, in pursuance of an authority given by him, remains the property of the builder, who may bring trover if it is removed or demolished, and has a right to enter for the purpose of taking it away, which cannot be precluded by the prohibition of the owner of the soil, or a revocation of the authority under which it was built (ante, 541); *Osgood v. Howard*, 6 Greenleaf, 452; *Barnes v. Barnes*, 6 Vermont, 388; *Doty v. Gorham*, 5 Pick. 487; *Fletcher v. The Commercial Insurance Company*, 18 Id. 417; *Barnes v. Barnes*, 6 Vermont, 38; *White's Appeal*, 10 Barr, 252; *Van Ness v. Packard*, 2 Peters, 137; *Russell v. Richards*, 10 Maine, 429; 11 Id. 371; *Hilborne v. Brown*, 12 Id. 162. Thus, in *Russell v. Richards*, the right acquired by the erection of a saw mill, under a license from the owner of the land, was said to be distinct from the title to the soil on which it stood, and to entitle a purchaser of the building to maintain

trover for its removal, against a subsequent purchaser of the land. The law was held the same way in *Hilborne v. Brown*, and *Doty v. Gorham*; while in *Smith v. Benson*, 1 Hill, 176, the mortgagee of a building, was held entitled to recover the full value of it from the owner of the land, on proof that the latter had refused to permit him to enter for the purpose of taking it away. "*Prima facie*," said Cowen, J., in delivering the opinion of the court, "such a building would be a fixture, and would not be removable. The legal effect of putting it on another's land, would be to make it part of the freehold. But the parties concerned may control the legal effect of any transaction between them, by an express agreement. They have, in effect, stipulated, that the placing of this building on the grounds of Brackett and Wood, should work nothing more towards changing its nature, than if it had been the loose timber of the house, instead of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and remainderman. And, surely, the parties may, by express agreement, do the same thing, and even more. If they agree, in terms, that a dwelling house shall, as between them, be considered strictly a personal chattel, it takes that character. And so of any equivalent agreement or understanding, which, we think, existed in this case between all the parties concerned." The case of *Leland v. Gassett*, 17 Vermont, 403, might seem at variance with this course of decision, but really turns on the point, that when a house is erected on the faith of a parol gift of the land on which it is built, the remedy lies in a bill in equity, for the conveyance of the fee, and not in a suit at common law.

• These cases obviously proceed on the ground, that the erection of a building or structure of any sort on the land of another, on the faith of an express or implied license given by him, will give the licensee an interest in the building, distinct and separate from the ownership of the land, and thus bring the case within the general principle, which makes a power coupled with an interest, subsidiary to the interest, and insusceptible of revocation, so long as interest endures. But we shall see, hereafter, that the authorities differ widely as to the true limits and operation of this rule, when permanent structures are in question; and that, while there are some decisions which treat the license as coextensive with the duration of the structure to which it relates, the weight of authority is the other way, and in favor of restricting the estoppel to the right of entry and removal, which exists when ordinary chattels are in question.

Whatever doubt may exist, as to the length of time during which a license should be held to endure, or the circumstances which will render it irrevocable, it will unquestionably protect those who act under it, without notice of a change of purpose on the part of the person by

whom it was given. Good faith requires, and the plainest principles of justice demand, that the owner of land should not treat acts done under his authority, or with his express or implied sanction, as wrongful, or make them the foundation for a recovery in damages. This is too plain for demonstration, when the authority is express, and equally true, when it is implied from facts and circumstances, or the relations which subsist between the parties. *Johnson v. Lewis*, 13 Conn. 36; *The Occum Co. v. The Sprague Manufacturing Co.*, 34 Id. 529. Indeed, to use the language of Chief Justice Vaughan, in *Thomas v. Sorrell*, the very essence of a license is to render that lawful, which, without it, had been unlawful, and no citation of authorities is necessary to show, that a man cannot authorize another to enter upon, or walk over his land, and then sue him in trespass, for taking advantage of the permission. Hence, a license will be a full justification for all acts done in pursuance of it while unrevoked, even when they consist in the exercise of a temporary ownership or dominion over the land, and would, if repeated under a claim of right, have the character of an estate or easement. *Bishop v. Babcock*, 22 Vermont, 295; *Desloge v. Pearce*, 38 Missouri, 588; *Selden v. The Delaware Canal Company*, 29 New York, 634; *Marston v. Gault*, 4 Foster, 176; *Millard v. Reeves*, 1 Manning, 107. The law has been so held in England, from the earliest periods, and is equally well settled in this country. The breadth of the authority, or the extent to which it goes, makes no difference in the principle, and a license will be a justification even for those acts, which, like cutting down a wood, or removing the ore or gravel from a quarry, vary the character of the land, or deprive the inheritance of its chief value. *Pierrepoint v. Barnard*, 5 Barbour, 364; 2 Selden, 279, *Syron v. Blakeman*, 22 Barbour, 336. Hence, although the right given by a permission to remain upon, or use the premises of another, ceases as soon as the permission is withdrawn, and will, therefore, form no defence to an action of ejectment, it will, notwithstanding, be a good answer to an action of trespass, brought to recover the mesne profits of the land for the period during which it continued. This is a necessary inference, from the cases of *Smith v. Goulding*, 6 Cushing, 154, and *Syron v. Blakeman*, which establish the point, although in a somewhat different form.

It is, however, necessary to remember, that to render an express or implied license available as a defence to an action of breaking the close of the plaintiff, or for remaining upon it, and taking the profits while there, it must be specially pleaded, and that it will not be admissible in evidence, under the general issue. *Ruggles v. Lesure*, 24 Pick. 187; *Gronour v. Daniels*, 7 Blackford, 108; *Crabbe v. Fetrick*, Ib. 373.

It is equally well settled, as indeed Chief Justice Vaughan observed, that a license may change and alter rights of property, if not directly, yet by its effects, or as a consequence of its execution (ante, 554). Thus,

the execution of a license to eat a loaf of bread, or remove manure belonging to the licensor, and spread it on the land of the licensee, will not only divest the right of him who gave the license, but confer a beneficial interest on the person to whom it was given, which certainly cannot be recalled in the case of the bread, and will be equally irrevocable, where the manure is in question. In these cases, however, there is nothing in the nature of the property which would have prevented the license from taking effect at once as a gift, had the licensor chosen to put it in that form, instead of limiting it to an authority; and it is more difficult to determine, whether an oral license to appropriate or remove any portion of the inheritance, can have a force which the common law and the statute of frauds agree in refusing to it, when originally given, even if intended to be irrevocable, and to operate as a grant. The question arose in *Pierrepoint v. Barnard*, 5 Barbour, 364; 2 Selden, 279; where the Supreme Court of New York were of opinion, that the cases which establish that standing timber is part of the inheritance, and will not be bound by an oral license or contract (*Crosby v. Wordsworth*, 6 East, 662; *Carrington v. Roots*, 2 M. & W. 248; *Rodwell v. Phillips*, 9 Id. 501; *Green v. Armstrong*, 1 Denio, 550; *Putney v. Day*, 6 New Hampshire, 438; *The Earl of Falmouth v. Thomas*, 1 C. & M. 89, 111, note) are applicable, even when the license has been acted on or executed. But this decision was subsequently reversed by the Court of Appeals, on the ground that, although the execution of the license might have been arrested at any moment, by a countermand, the acts done under it while still in force, were valid; and that the licensee consequently acquired a right to the timber which he felled, which could not be divested by a subsequent revocation. The case of *Nettleton v. Sikes*, 8 Metcalf, 34, sustains the same view of the question; while in *Syron v. Blakeman*, 22 Barbour, 336, a license to dig and carry away gravel, was held to be a good answer to an action of trespass *de bonis asportatis*, brought by the licensor. In *Davis v. Townsend*, 10 Barbour, 333, a license to a tenant to remove buildings, which he had erected on the land during the term, was, in like manner, held to be a good defence to an action brought for the asportation, notwithstanding the objection, that the realty was in question, and the case fell directly within the statute of frauds. And in *Desloge v. Pearce*, 38 Missouri, 560, 588, the court said that although the defendants could not remain on the land under a license to open and work a mine after the authority was revoked, they were, notwithstanding, entitled to a reasonable time to remove machinery and fixtures which had been erected on the faith of the license.

These principles are illustrated, by the case of *Miller v. The Syracuse and Auburn Railroad Company*, 6 Hill, 64, where the court held that although a parol license to enter and raise an embankment on the

plaintiff's land, was essentially revocable, and might be cancelled after it had been executed, it was, notwithstanding, a justification for acts done while it was still in force, and that the plaintiff could not recover for the injury inflicted on his land, without proving that the license was recalled, and that defendants went on with notice of the revocation. "Whether the case at bar," said Cowen, J., in delivering the opinion of the court, "be or be not distinguishable from those which hold that neither corporeal nor incorporeal hereditaments can be conveyed by parol, need not now be decided. Suppose it be not distinguishable. Suppose the right which the defendants claim to exercise could not be granted by a parol license executed. There is still nothing in the case to prevent the license operating according to its own nature; and there is no book which teaches that before a license is revoked or has expired, though it be not executed, a man is liable to pay damages for availing himself of it. It is personal to himself; and if it regard land, it is gone if the owner who gave the license transfer his title to another. So, doubtless, by the death of either party, and yet it is a justification till gone. This is well understood as to trespass on land, and it is the same in case for an injury to land, or indeed an injury of almost any kind; *Smith v. Feverell*, 2 Mod. 6. In *Wallis v. Harrison*, 4 M. & W. 538, which was case by a reversioner for digging the soil and embanking and making a railway in the close possessed by his tenant, the defendant pleaded license from the dean and chapter of Durham, who were seized before the plaintiff had any interest; and it was not doubted that the license, though unexecuted, would completely protect the defendant up to the time when the dean and chapter parted with their interest to the plaintiff. It does not follow, by any means, that because a license is void for the purpose of carrying an interest irrevocable, it may not endure as a personal authority, and, until revoked, protect the defendant against an action for a wrong. Indeed, there cannot, in the nature of things, be any legal wrong until the license is countermanded, unless it can be said that one may do an actionable wrong to himself touching his own property.

"If what the defendants in this case proposed to show was true, viz., that the plaintiff verbally authorized the making of the railway, while the authority remained their acts were no more a wrong to the plaintiff than if he had done them himself. License is defined to be a power or authority. Toml. Law Dict. tit. License. It followed that the defendants, so long as the license to make their way was not countermanded, were acting in the plaintiff's own right, *qui facit per alium facit per se*. The license, according to the terms proposed by the proof, did not claim to be a grant, and the plaintiff claims that it could not be. It would be most strange, if, because it could not operate as something more than what it professed, it should therefore, be holden void for its

avowed object, and that too, a perfectly legal one. The defendants should therefore, have been allowed to prove it, if they could. To such proof, if given, the plaintiff might have answered by contradictory evidence, or by proving a revocation of the license, and recover damages only from that time, if the defence had proved imperfect in other respects." A similar decision was made in *Parsons v. Camp*, 11 Conn. 525, and a permission given orally that the grantor might enter and remove the manure which he had left on the land, held to preclude the grantee from maintaining trespass, for a subsequent entry in pursuance of the license and before it was revoked. The same ground was taken in *Smith v. Goulding*, 6 Cushing, 154, where the court were of opinion, that the defendant could not be made answerable for building a dam, and thus flooding the land of the plaintiff, without proof that the license under which he acted, had been revoked in time to enable him to remove the dam before the action was instituted. In like manner a sale which fails under the statute of frauds as a contract, may be good as a license, and afford an answer to an action of trespass brought to recover damages, for the removal of ore or timber. *Riddle v. Brown*, 20 Alabama, 412.

In most of these instances the license was express, but it may be implied, from the circumstances of the case, or from any conduct of the plaintiff, tending to show that he authorized or sanctioned the acts, for which he seeks to make the defendant answerable in damages. *Martin v. Houghton*, 45 Barb. 258; *The Occum Co. v. The Sprague Man. Co.*, 34 Conn. 524. Thus, no liability is incurred, by an entry into a shop to make a purchase, or into the house of a friend, for the purpose of paying him a visit, because the relations which subsist between the parties, in the one case, and the object for which the premises are used, in the other, are a sufficient authority for the entry, and, in the language of Vaughan, render that lawful, which had otherwise been unlawful. *Martin v. Houghton*. In like manner, permitting a chattel to be left on land, or bringing it there against the will of the person to whom it belongs, gives an implied authority to enter for the purpose of taking it away, which cannot be recalled until a reasonable time had been given for its exercise; *Wood v. Manley*, 11 A. & E. 345; *Patrick v. Colerick*, 3 M. & W. 483; while a similar course of reasoning will authorize a man, who finds the cattle or goods of a neighbor in his own close, not only to remove them, but to enter on his neighbor's land for the purpose of restoring them to him, or placing them in a situation where he can get them. *Rea v. Sherwood*, 2 M. & W. 424. A different view taken in *Heermance v. Vernoy*, 6 Johnson, 5, and *Blake v. Jerome*, 14 Id. 406, cannot easily be reconciled with the authorities or with principle.

An implied license may also arise from the business carried on in a

house, or the purpose to which the land is devoted by the owner. One instance of this sort is furnished by the case of a shop (ante, 555), while others may grow out of any course of conduct calculated to create the impression, that the land is open to all comers, and thus lead to an entry upon it, under the belief that it will be sanctioned by or be agreeable to the owner. This view was taken in *Heany v. Heany*, 2 Denio, 625, and the erection of a wharf, said to give an implied license to all who were engaged in the navigation of the stream on which it stood, to use it as a means of landing from, or securing their vessels, which could not be recalled without giving those who had acted on the implied authority, a reasonable opportunity to provide for their own safety, and that of their property. And the defendant was consequently held liable for the injury occasioned by cutting the hawser of a vessel, which had been moored to his wharf while he was absent, and suffering her to be carried away by the force of the stream, without apprising those on board of what he was about to do, or giving them sufficient time to remove the vessel to a place where she would be secure.

A license may also be implied from circumstances beyond the control of the parties, as where a house is on fire, and it becomes necessary to break open the doors or pull it down, in order to extinguish the flames. Other instances are enumerated in Comyn's Digest, title Pleader, pl. 36, 37, 38. In the case first supposed, the authority is given by the law, and might arise without the assent, or notwithstanding the prohibition of the owner. *Respublica v. Sparhawk*, 1 Dallas, 357, 365. It must, therefore, be strictly followed, and any excess will render the party a trespasser *ab initio*. In *Lyford v. Putnam*, 35 New Hampshire, 563, where the contract of sale contained a provision, that no more timber should be cut before the execution of the deed, than was necessary for the payment of the first instalment of the purchase money, the court held, that this limit could not be exceeded, without rendering the whole a trespass. If the license here, was implied in one sense, it was expressed in another, and certainly arose from the agreement of the parties. It did not, therefore, fall within a principle, which only applies to authorities in law. In *The Johnston Iron Co. v. The Cambria Iron Co.*, 7 Casey, 241, an excess in the execution of a license, was accordingly said not to warrant a recovery in trespass. Where, however, the excess is distinguishable from the rest, as when two trees are felled under a license to cut down one, trespass will lie for the wrong. See 1 Smith's Leading Cases, 263, 6 Am. ed.

It is moreover well settled, that as a license is essentially revocable, a man cannot justify remaining on land of another in opposition to his will, on the score of convenience, or for a moment longer than the time reasonably necessary to remove himself and his effects from it in safety.



*Bogert v. Haight*, 20 Barbour, 251; *Taplin v. Florence*, 10 C. B. 44. And although the licensee may generally act as if the license was in force, until he receives notice to the contrary; *Webb v. Paternoster*, Popham, 151; *Palmer*, 71; *Heany v. Heany*, 2 Denio, 625; *Smith v. Goulding*, 6 Cushing, 154; this ceases to be true, when the revocation takes place by a grant to a third person, because it is more reasonable to suppose that the licensee will, or might inform himself of the grant, than to require the grantee to take notice of a prior transaction to which he was a stranger at the time, and which may not have been brought to his knowledge subsequently. *Wallis v. Harrison*, 4 M. & W. 538.

From the cases which have been cited, we may deduce two things, one, that a license will be a full justification for the acts done under it, even when they consist in the exercise of an authority or privilege on land, and would, if repeated under an indefeasible right be in effect an estate or easement; *Selden v. The Delaware Canal Co.*, 29 New York, 631; the other, that a license cannot be revoked or withdrawn, so long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, or placed with his assent, in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule, that no one can recall a promise or declaration, made with a view to influence the course of another, after he acted upon it, and thus place himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises under these circumstances to prevent the legal title from being used as a means of injustice. See 2 Smith's Leading Cases, 761, 6 Am. ed.

When the property in question is a chattel which can be used elsewhere, the application of this principle is comparatively simple, and a license to enter and remove it will be implied, which being temporary in its nature, will not permanently charge or burden the land. But the case is very different, when time and money are expended in the erection of a structure, which depends for its value on the position in which it stands, and will be lost to the builder if the license is withdrawn. Thus, a right to enter and remove a stack of hay or an ox, which has been placed on the land of another with his assent, and which he unjustly refuses to deliver, may be sufficient to redress the wrong, but will be a very inadequate remedy when a dam or other structure is erected on the land of another, or a house is built in reliance of an assurance that an adjoining lot shall remain open for the free access of the light and air. Here, the restoration of things to the state in which they were when the promise was given, would obviously be insufficient for the purposes of justice, and no adequate relief can be afforded short of holding that the owner of the lot is estopped from building on it in violation of his promise.

This doctrine may be traced to the case of *Winter v. Brockwell*, 8 East, 308; where the plaintiff was held to be precluded from asserting his right to have an area on the defendant's land left open, as a means of affording air to his own premises, by a license to enclose the area, which had been carried into execution at a considerable expense by the defendant; and Lord Ellenborough said, that it would be very unreasonable if a man could recall a permission on which another had acted, and treat that as a trespass which he himself had authorized. And he went on to say, that this opinion was fully sustained by the books, and more particularly by the case of *Webb v. Paternoster*, Palmer, 71; Popham, 151; which showed, that although an executory license is revocable, it ceases to be so when executed.

This case has since been segregated from the mass of decision, on the ground that the license was to be executed on the land of the licensee, and not on that of the licensor, and operated as an extinguishment and not as a grant of an easement. *Morse v. Copeland*, 2 Gray, 262 (post); but the principle stated by Lord Ellenborough, took root in this country, and was applied broadly without noticing the restrictions which were imposed upon it in England. The question arose at a comparatively early period in the Supreme Court of Pennsylvania, in *Lefevre v. Lefevre*, 4 S. & R. 241, which was an action brought against the defendant for taking up certain pipes, which had been laid down in his land in pursuance of a covenant to that effect between him and the plaintiff, and removing them to another field under an oral license varying the original agreement. It was contended under these circumstances that the right given by the covenant was, if not gone, at all events, in abeyance, and that the new contract was, at the most, a license, determinable at any moment, and which could not give a right or easement. But the court were clearly of opinion that, although the license was invalid when given, it became irrevocable when executed, and precluded the defendant from avoiding an act which he had authorized, to the injury of the plaintiff, who had expended his money in the belief that the change in the position of the pipes would not be used to his disadvantage. It was said on the authority of an anonymous case, in 2 Equity Cases, Abr. 522, that a man who stands by and encourages, or even knowingly permits another to purchase or make improvements on his land, will be estopped from making an objection subsequently, which he withheld at the time when good faith required him to state it openly. This case was followed in *Rerick v. Kerns*, 14 S. & R. 267. (ante, 547); and an executed license said to fall within the principle, on which equity decrees the specific performance of agreements, which are substantiated by an actual change of possession, and when a recovery in damages would be inadequate to the purposes of justice, notwithstanding

ing the apparent inconsistency of such relief, with the rules of the common law and the provisions of the statute of frauds. *Bond v. Hopkins*, 1 Schoales & Lefroy, 433.

The same view was taken in *McKellip v. McIlhenny*, 4 Watts, 317, and *Swartz v. Swartz*, 4 Barr, 353, and the execution of a license said to give rights which would be protected by equity, even if invalid at law. "Whenever," said Kennedy, J., in *McKellip v. McIlhenny*, a person has induced another, upon the faith of his promise, though verbal, to expend money or labor, for which he can only be remunerated by the enjoyment of the thing so promised, equity will compel the promisor to give such deed or writing as shall be requisite to secure the possessor in the perfect enjoyment of what was promised. And here, where we have no court of equity to compel such a thing to be done, it will be considered in our courts of law as actually done, and the grantee protected in the enjoyment of the thing promised accordingly."

This decision will probably appear altogether sound, if we remember that the court, which pronounced it, was invested with the jurisdiction, though not with the powers of a court of chancery, and was fully authorized to administer equitable principles through the forms of the common law. It has been said that no equitable estoppel can grow—in the sense in which the term is understood and applied at law—out of the expenditure of money in the purchase of the land of another, or in the erection of a building upon it, in reliance on an authority or license given by the owner, unless the title of the latter is withheld or concealed, so that the person by whom the money is laid out cannot protect himself by taking a deed or writing; 2 *Smith's Leading Cases*, 760, 6 Am. ed.; because if a man chooses to rely on the good faith of another, instead of pursuing the path marked out by law, he cannot complain if the law refuses to relieve him from a risk which he has voluntarily incurred. 2 *Leading Cases in Equity*, 674, 3 Am. ed. But, however true this may be at law, the principle has a wider range in equity, which draws a line between participation or encouragement and mere acquiescence; *Wells v. Pierce*, 7 Foster, 503; and will enforce agreements which have been so far executed by an actual transfer of possession, as to put their existence beyond question, and render it difficult to restore the parties to their original position without injustice.

It is well settled that a parol contract of sale, followed by the entry of the purchaser, and the erection of a house, or the expenditure of money in other ways, on the faith of the contract, may give a right which equity will enforce, notwithstanding the provisions of the statute of frauds; *Parkhurst v. Van Cortland*, 14 Johnson, 15; *Syler v. Eckhart*, 1 Binney, 378; 1 *Leading Cases in Equity*, 569, 3 Am. ed.; and the same result may follow when buildings are constructed or machinery

placed on the land of another, in reliance upon an express or implied promise by the latter not to assert his title, or in consequence of his concealing it, when good faith required that it should be made known. *Stiles v. Cooper*, 3 Atkins, 602; *Hall v. Fisher*, 9 Barbour, 17; *Robinson v. Erwin*, 2 Penn. 19; *Carr v. Wallace*, 7 Watts, 396; *Pittsburgh v. Scott*, 1 Barr, 309; *Hamilton v. Hamilton*, 4 Id. 195; *Corbett v. Norcross*, 35 New Hampshire, 99; *Watkins v. Peck*, 13 New Hampshire, 361; *Taylor v. Ely*, 25 Connecticut, 250; *Cummings v. Webster*, 43 Maine, 192; *Galleny v. Rodman*, 6 Indiana, 280; *Story v. Parker*, 6 Johnson, Ch. 166; *Dinsmore v. Ely*, 1 Barbour, 620; *Martin v. Righter*, 2 Stockton, Ch. 510; *Short v. Taylor*, cited 2 Equity Cases, Abr. 522. The right to go so far, necessarily implies the right to stop short at any intermediate point, and give a qualified limited interest in the shape of an easement, instead of directing a conveyance of the land itself. But as this doctrine is one which originated in equity, it cannot be applied by a court of law, without pushing the maxim that jurisdiction should be enlarged for the sake of the remedy to an extreme. Hence, it would seem questionable whether a legal tribunal can rely on *Rerick v. Kerns*, as an authority for distinguishing between an executed and an executory license when land is in question, and enforcing the one while holding the other void. The doctrine that assurances on which others have acted cannot be falsified at law to their injury, has, however, been largely applied of late years, under the title of equitable estoppel, to redress wrongs for which the remedy was formerly by an injunction out of chancery, and may, sometimes, enable an end to be attained circuitously, which could not be effected by direct means. Thus, the cases which have been cited, and the remarks of Baron Alderson, in *Wood v. Leadbitter*, show that when a thing sold or given is at the time on the land of the donor, he will be estopped from defeating his own grant by refusing the grantee permission to enter and take the gift. Here the end in view is the removal of the goods or chattel in question from the land of the licensor, to a place where it may be used or enjoyed by the licensee without hindrance, and the estoppel is limited by the purpose for which it is called into being; but instances may arise of a different nature, where a mere right to enter and remove will not be sufficient, and where the estoppel must go further in order to be effectual. If the rights of the owner of the land can be held in abeyance temporarily, on the ground that good faith forbids their exercise, the same process may be repeated as often as the occasion requires, and a result attained which cannot be distinguished from the creation of an estate or easement. We have seen that the erection of a building on the land of another, on the faith of a license given by him, may create an interest in the building distinct from the title to the land, and thus afford room for the application of the rule, that a power coupled

with an interest is irrevocable while the interest endures. It cannot be said, under these circumstances, as it was in *Wood v. Leadbitter*, that the grant is wholly inoperative or void; and the question arises, whether the course of reasoning which precludes the owner of land from appropriating the chattels of another to his own purposes, by refusing to allow them to be removed, will justify the occupation of a permanent structure which has been erected on the faith of an express or implied agreement that it should be occupied by the builder, and which is of such a nature that it cannot be removed without losing the greater part of its value, and frustrating the purpose for which it was put up. A license to enter on land, and a license to remain there, are equally valid when originally given, and a justification for all acts done under them while unrevoked; and it may be thought that both should be protected against an irreparable breach of faith.

There is, accordingly, an array of decisions in this country, to the point that where the execution of a license on the land of another, results in the creation of an interest in a dam or building, apart from the land, the license will be coextensive with the interest, and irrevocable as long as it endures (ante, 570). *The Occum Manufacturing Company v. The Sprague Manufacturing Company*, 34 Connecticut, 524. Thus in *Riker v. Kelly*, 1 Maine, 117, the erection of a bridge on the faith of a license, was held to render the licensor liable for its subsequent removal; and executed licenses were said not to be within the provisions of the statute of frauds; while in *Clement v. Durgin*, 5 Maine, 9, the broad ground was taken that, where the continuance of a license is necessary for the protection of an interest, which was acquired on the faith of an express or implied agreement that the license should not be revoked, the case will fall within the general principle, that a man shall not be allowed to falsify expectations which he has created, and on which others have been led to act. The question grew out of a permission which had been given by the defendant to overflow his land, by the erection of a dam lower down the stream on the land of the plaintiff, and the court were clearly of opinion, that the license could not be withdrawn without tendering the money which the plaintiff had laid out. A similar decision was made in *The Androscoggin Bridge v. Brogg*, 11 New Hampshire, 102, and the conduct of the defendant, in authorizing the construction of a bridge upon his land, and standing by subsequently, without objection, said to render him liable in trespass, for breaking down a toll gate, which was an appendage to the bridge. The same ground was taken in *Woodbury v. Parshley*, 7 New Hampshire, 237, and *Sheffield v. Collier*, 3 Kelly, 82; and again, in *Wilson v. Chalfant*, 15 Ohio, 247, where the court acted on the principle, that an executed license stands on the same footing at law, as an executed parol agreement in equity, and is irrevocable, whether it

relates to lands or chattels. And in *The Occum Manufacturing Company v. The Sprague Manufacturing Company*, 34 Connecticut, 529, it was said that such an estoppel may arise from consent tacitly given; and that the law would not permit a man who had stood by and seen a dam erected without objection, to require it to be torn down because it flooded his land.

The weight of authority in this country and in England, is, however, at variance with this course of decision, and establishes that, if the principle which has been stated prevails in equity, it cannot be enforced by a legal tribunal, consistently with the statute of frauds. *Marston v. Gale*, 24 New Hampshire, 176; *Houston v. Lafee*, 46 Id. 505; *Combe v. Burke*, 2 Hill, S. C. 534; *Foster v. Browning*, 4 Rhode Island, 47. The question arose in *Fentiman v. Smith*, 4 East, 107, where the court were of opinion that the defendant might close a tunnel which passed through his land to the plaintiff's mill, although he not only consented to have it opened, but had assisted in laying the pipes through which the water flowed. A right to maintain a water course on the land of another was said to be substantially an easement, which required a deed and could not be created by an oral license. It may be proper to observe, that the declaration in this instance was essentially faulty in averring a right to the tunnel as appurtenant to the mill, instead of setting forth the license in connection with the circumstances which were alleged to render it irrevocable, and then claiming damages for the wrong done by revoking it. A similar view was taken in the subsequent case of *The King v. Horndon-on-the-Hill*, 4 M. & S. 562; and a license to build a cottage on the land of another, for the use of the licensee, said to be revocable at any time, even when the necessary result of revoking it, would be to deprive one of the parties of the fruits of his money or labor and confer them on the other, in violation of the express or implied understanding between them when the license was given. The point, however, can hardly be said to have been before the court, because the controversy was as to the settlement of a pauper, and involved a question of title, rather than of power. But this remark does not apply to the case of *Hewlins v. Shippam*, 5 B. & C. 22, where the declaration averred that a license was given by the defendant to open a drain through his land, which was constructed by the plaintiff in reliance upon the license, and that the license was subsequently withdrawn and the drain closed, to the injury of the plaintiff, without notice of the revocation, or a tender of compensation for the sum which he had expended. Bayley, J., in delivering the opinion of the court, said that the declaration was radically bad, because an oral license could not operate as a grant or create an interest which partook of the nature of an incorporeal hereditament, and required a deed. The case of *Winter v. Brock-*

well, 8 East, 209, was said to be distinguishable, because the license was limited to acts done upon the land of the licensee, and was not set up as a justification for the exercise of a right on the land of the licensor, which was essentially an easement, lying in grant, and insusceptible of being called into existence by parol. This decision was cited and confirmed in *Wood v. Leadbitter* (ante, 560), where it was said that the principle, which precludes the revocation of a license coupled with a grant, does not apply unless the grant is valid, which cannot be alleged where an oral license is relied on as the foundation of an easement or other incorporeal hereditament.

The best considered decisions in this country agree with the English authorities, that an easement cannot grow out of the execution of a license which is not reduced to writing. A man may have an irrevocable right to enter on the close of another for the purpose of obtaining possession of a chattel which is withheld from him unjustly. Such a right is limited to a single act, and expires as soon as that is performed. But a right to do successive acts on land, or to occupy it permanently in any way is virtually a hereditament, and requires a writing sustained by a consideration or under seal. *Desloge v. Pearce*, 38 Missouri, 560; *Morse v. Copeland*, 2 Gray, 302; *Hatfield v. The Central Railroad Company*, 5 Dutcher, 571; *Eggleston v. The New York Railroad Company*, 35 Barb. 162; *Houston v. Laffer*, 46 New Hampshire, 505; *Foster v. Browning*, 4 Rhode Island, 47. The law was so held at a comparatively early period, in *Cook v. Stearns*, 11 Mass. 533, which arose on a plea to an action of trespass *quare clausum fregit*, that the alleged trespass had been committed for the purpose of repairing a dam, which had been erected on the land of the plaintiff under a license given by him, for the purpose of furnishing a supply of water to a mill, which stood at some distance on the land of the defendants. The plea was held bad on demurrer, as averring the creation of a right by parol, which was virtually an interest in land, and could not be created orally, without violating the rules of the common law, and the provisions of the statute of frauds. "Licenses to do a particular act," said Parker, C. J., in delivering the opinion of the court, "do not in any degree trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute. If the defendant had a license from the former owners of the plaintiff's close, to make the bank, dam and canal in their land, this extended only to the act done, so as to save him from their action of trespass for that

particular act; but it did not carry with it an authority at any future time to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it without any reservation, would, of itself, be a countermand of the license. For although when one is permitted to do certain things upon the land of another, an implied authority is given to enter upon the land to do the thing and to repair it, if it is of a permanent nature, yet the first permission or license must be by grant, in order to draw after it this consequence.

"We are also satisfied that the plea is in this respect bad, in not showing such a license as may be pleaded; and indeed the interest claimed being not in the nature of a license, but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a possession or use as furnishes presumption of a grant, neither of which is averred in this plea.

"If the defendant's plea were held to be a bar to the action, all the mischiefs and uncertainties which the Legislature intended to avoid by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not, on the land which they purchase."

These principles may be traced through the subsequent course of decision in Massachusetts, and in most of the other States of the Union, which establishes, in accordance with the language held in *Hewlins v. Shippam*, that no permanent right or privilege can be given in land without the aid of a written instrument, which must, moreover, when the strict rule of law is pursued be verified by a seal. *Morse v. Cope-land*, 2 Gray, 302; *Clinton v. McKenzie*, 5 Stobhart, 36; *Ruggles v. Lesure*, 4 Pick. 187; *Stevens v. Stevens*, 11 Metcalf, 251; *Foot v. The New Haven and Northampton Railroad Company*, 23 Conn. 214; *The Collins Manufacturing Company v. Marcy*, 25 Conn. 239; *Foster v. Browning*, 4 Rhode Island, 47; *Pitman v. Poor*, 38 Maine, 237; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Ex parte Coburn*, 568; *Mumford v. Whitney*, 15 Wend. 380; *Miller v. The Auburn Railroad Company*, 1 Hill, 61; *Couch v. Burke*, 2 Hill, S. C. 534. Thus, in *Mumford v. Whitney*, the court gave their unqualified assent to the doctrine held in *Cook v. Stearns*, and decided that, although a license might confer a temporary or transient right, it could not be allowed to operate as a justification for the permanent occupation of land, without incurring the evils which the statute of frauds was intended to remedy. Similar language was held in *Miller v. The Auburn Railroad Company*, and every permanent right or privilege on the land of another said to be an easement, which could not be called into being by the execution of a parol license, or without resort to a writing. The same view was taken in *Den v. Baldwin*, 1 Zabriskie, 390, and *Houghtailing v. Hough-*



*tailing*, 5 Barb. 379, which decide that a license cannot take the place of a grant, or serve as the foundation of an action of ejectment or trespass *quare clausum fregit*, whatever may be its effect in equity. These cases were followed in *Jamison v. Milleman*, 3 Duer, 255, and held to preclude a landlord from relying on a license by his tenant, as a justification for going on with the excavation of a cellar on the demised premises, after the license had been revoked; while in *Carleton v. Reddington*, 1 Foster, 291, and *Seidensparger v. Spear*, 17 Maine, 123, the courts of Maine and New Hampshire qualified or overruled their earlier decisions, by holding that, if the execution of a parol license on the land of another could render it binding, as between the original parties, which seems to have been doubted, it could not operate as a grant, or confer any interest which could pass by an assignment from the licensee, or operate as a bar against subsequent purchasers from the licensor. The question was elaborately examined in *Hayes v. Richardson*, 1 Gill & J. 266, and *Carter v. Harlan*, 6 Maryland, 20, where the court held. that the only mode in which a right of way over land, or to flow it by damming up the waters of a stream could be created was by an instrument under seal. It was said that a man could not by acting under an invalid grant cure the original defect or acquire a right. And the cases of *Woodward v. Seely*, 11 Illinois, 157; *Pitman v. Poor*, 38 Maine, 237; *Marston v. Gale*, 24 New Hampshire, 176; *Houston v. Laffee*, 46 Id. 505; *Deloge v. Pearce*, 38 Missouri, 560; and *Morse v. Copeland*, 2 Gray, 302, follow the strict rule of the common law, that a parol license to occupy or overflow the land of another, may be recalled even after it has been executed.

Notwithstanding the apparent discrepancy between these decisions, and those in which the execution of a license has been held to give an indefeasible right or authority in the nature of an incorporeal hereditament, the difference between them would seem to be chiefly as to the form of the remedy, and the forum where it should be sought, and hardly extends to the existence of the right or the interpretation of the principles on which it rests. *Foster v. Browning*, 4 Rhode Island, 47. • Every one must assent to the position taken by Chief Justice Gibson, in *Rerick v. Kern*, that equity will decree a specific performance when compensation in damages would be inadequate to the purposes of justice, and that the partial execution of a parol agreement may supply the want of a writing and withdraw the case from the operation of the statute of frauds (ante, 547). Nor would it be easy to take any valid exception to the dictum of the same judge, in *Swartz v. Swartz*, 4 Barr, 353, 358, that, when the revocation of a license would operate as a fraud, a chancellor will turn the licensor into a trustee, *ex maleficio*, for the licensee, on principles analogous to those which apply when the owner of land stands by and allows another

person to make improvements on it, under the belief that he will be allowed to reap the fruits of his labor and expenditure. A man who builds a house on the land of another in reliance on gift or a contract, is entitled to a conveyance of the land itself; 2 Story's Equity, sect. 60, 761, *Wetmore v. White*, 2 Caine's Cases, 87; and the erection of a house, or other permanent structure on the faith of a license rests on the same principle. 2 Story's Equity, 68 sect. 768, *Pope v. Hay*, 24 Vt. 560. When, therefore, a license is so far executed that the revocation of it would be a fraud, an equitable right will arise in the nature of an easement which may be transferred to third persons, and will be binding on every one claiming through or under the licensor with notice. *Foster v. Browning*, 4 Rhode Island, 47, 53; *Den v. Baldwin*; *Frost v. The New Haven and Northampton Railroad Company*; *Bridges v. Purcell* (ante, 576). Thus in *Pope v. Hay*, the complainant who had built a house on the faith of an oral license, was held entitled to protection against a purchaser from the owner of the land, on the ground that the possession of the house was sufficient notice of the right of the occupant. It was indeed doubted in *Wolfe v. Frost*, 4 Sanford's Equity, 92, whether, the execution of a license can confer a right which will be valid after the license in which it originated, has been revoked; but the point actually decided was merely that throwing a house back from the line of the street, on the faith of a promise by the owner of the adjoining lot to build his house on the same line was not a sufficient ground for an injunction, because the acts set up as a part performance were not shown to have been done under and in pursuance of the alleged agreement. The complainant might have put his house where he did, if no promise had been made to him by the respondent.

We may therefore infer that the execution of a license like the part performance of an oral contract of sale, is a sufficient ground for relief in equity; *Sheffield v. Collier*, 3 Kelly, 82; *Wynn v. Garland*, 19 Arkansas, 23; and the only doubt is whether jurisdiction can be exercised concurrently by a legal tribunal. Fifty years ago this question could only have admitted of one reply, but redress may now be had at law under the doctrine of equitable estoppel in a great variety of cases where it would formerly have been necessary to apply for an injunction (ante, 431). It is well settled that a man who sanctions the sale of a chattel, by words or even by acquiescence, cannot maintain a trover or replevin against the purchaser; *Packard v. Sears*, 6 A. & E. 469; *Stephen v. Baird*, 9 Cowen, 467; *Cox v. Breck*, 3 Strobhart, 366; *Thompson v. Sanborn*, 11 New Hampshire, 301; *Hubbard v. Briggs*, 31 New York, 518; *Mason v. Williams*, 8 Jones, 478; 2 Smith's Leading Cases, 743, 6 Am. ed.; and there is a strong and growing disposition to extend the rule to land. *Moran v. Palmer*, 13 Michigan, 367; *Spiller v. Scribner*, 36 Vermont, 245; *Keys v. Test*, 33 Illinois, 316; *Brown v. Bowen*,

30 New York, 519; *Peabody v. Leach*, 18 Wisconsin, 657; *Corkhill v. Landers*, 44 Barb. 218. The principle is the same in either case, and the question whether it should be enforced as an estoppel or through a bill in equity, is one of procedure depending on the law of the forum where the suit is brought. See *Rangely v. Spring*, 28 Maine, 127; *Meritt v. Horne*, 5 Ohio, N. S. 307; *Carleton v. Reddington*, 1 Foster, 291; *Batchelder v. Scarborn*, 4 Id. 474; *Howard v. Henderson*, 2 Ellis & Blackburne, 1; *Parker v. Barker*, 2 Metcalf, 21; *Dann v. Spurrier*, 7 Vesey, 231; *Powell v. Thomas*, 6 Hare, 300; 2 Smith's Leading Cases, 762, 6 Am. ed.; *Stiles v. Cowper*, 3 Atkins, 692; *Robinson v. Erwin*, 2 Penn. R. 19; *Wells v. Peirce*, 7 Foster, 503; *Jones v. Sasser*, 1 Dev. & Bet. 462; *Sasser v. Jones*, 3 Iredell's Eq. 19.

The question arose not long since in *Wood v. Hewitt*, 8 Q. B. 913, where the plaintiff was held entitled to damages for the removal of a hatch or fender, which he had placed on the land of the defendant in pursuance of an authority from him. It was contended that the title to the land drew with it everything that was annexed to or imbedded in the soil, but Lord Denman met this objection with the remark that the license presumably was not only to put up the hatch but to enter and take it away at pleasure, and if so the right of property remained in plaintiff. And Patterson, J., said, that the rule, *cujus est solem, ejus est usque ad coelum*, was subject to the control of the parties, who might agree that things which were *prima facie* fixtures should retain the character of chattels and be removable at pleasure. It is obvious how near this case comes to the doctrine that an hereditament may grow out of the execution of an oral license—a right to have a fixture on the land of another, and hold him liable in damages for taking it down, being hardly distinguishable from an easement.

In the subsequent case of *Perry v. Fitzhove*, 8 Q. B. 757, the controversy was whether a license to build a house on land in which the licensor had a right of common appurtenant, precluded the defendant who claimed under him by purchase, from treating the house as a nuisance and abating it by force. The plaintiff relied on *Harvey v. Reynolds*, 12 Price, 724, where a permission given by parol was held a good answer to an action brought to recover damages for an encroachment on a common, but the court were of opinion that even if the license was irrevocable as between the original parties, it could not run with the inheritance to third persons consistently with *Hewlins v. Shippam*, 5 B. & C. 221 (ante, 574).

It seems to be well settled that if an intention is manifested unequivocally by acts or declarations to abandon a charge or servitude, it cannot be enforced to the injury of persons who have acted on the faith of the renunciation. *Morse v. Copeland*, 2 Gray, 302; *Moore v. Rawson*, 5 B. & C. 332; *Arnold v. Cornman*, 14 Wright, 364. For a

like reason, an authority to pursue a course which will result in the extinguishment of an easement cannot be recalled after it has been carried into execution by the licensee. *Morse v. Copeland*. The authority or renunciation need not be express, and may be implied from the conduct of the party in looking on, without objecting. *Davies v. Marshall*, 10 C. B., N. S. 697; *The Occum Company v. The Sprague Mun. Company*, 34 Connecticut, 524.

The case of *Winter v. Brockwell*, 8 East, 308 (ante, 570), would seem to rest on this ground rather than the broader one taken by Lord Ellenborough, and the principle has been applied in various forms in England and in the United States. In *Moore v. Rawson*, 3 B. & C. 332, the substitution of a blank wall for a house with ancient windows, was held to be a tacit waiver of the right to light and air as against the defendant, who had erected a building on his own land, which the windows overlooked. The course of the plaintiff in building the wall was said to be evidence of an intention to abandon the easement, which if *prima facie* in the first instance became conclusive when acted on. In *Thayer v. Hampton*, 4 McCord, 96, the abandonment of a servitude was in like manner held to preclude the right to enforce it as against the defendant who had been misled by the conduct of the plaintiff; and the decision was cited and approved in *Corning v. Gould*, 11 Wend. 53, where the court said that although the non-user of an easement would not work an extinguishment, the case was different where the party who claimed the way or water-course obstructed it, or did any other act which led third persons to buy under the impression that the right had been definitively relinquished. A similar view was taken in *Dyer v. Sandford*, 9 Metcalf, 395, and a license given by the owner of the dominant tenement to obstruct the easement by the erection of a fence, said to be irrevocable after the fence was built, although the license might still come to an end through the decay of the fence, or under the limitations originally prescribed by the licensor.

It was held in like manner in *Morse v. Copeland*, 2 Gray, 302, that if an easement cannot be created without a deed, it may be modified or extinguished through a license given orally by the owner of the dominant tenement, and executed by the owner of the servient tenement. The plaintiff, who was entitled to raise the water of a stream through a dam standing on his land to a certain height on the land above, authorized the defendant to build a mill on the servient tenement further up the stream, and at the same time gave him permission to lower the water in the pool of the plaintiff's dam by a drain dug across the dominant tenement. The court held that as the plaintiff had manifested an unequivocal design to exonerate the servient tenement on which the defendant had relied in building the mill, he was bound by what he had done, and that although the license to lower the water by a ditch across

the plaintiff's land was revocable, the defendant might attain the same end by constructing a drain through his own land. Metcalf, J., said, that the license to cut the ditch might be revocable, because an easement could only be acquired by deed or prescription. But although this rule applied to licenses, which, if given by deed, would create an easement, it did not apply to licenses, which if so given would extinguish or modify an easement already in existence. In the one case, the license took effect on the land of the licensee, and the other on the land of the licensor.

These cases do not go beyond the proposition, that the right to subject the land of another to an easement or privilege may be waived and the land restored to its original condition, by declarations or acts in *pais*, without the aid of a release or other instrument in writing; *Houston v. Laffée*, 46 New Hampshire, 505; *Morse v. Copeland*, 2 Gray, 302; *Woodward v. Seely*, 11 Illinois, 157, and must not be regarded as authority for more than they actually determine. But the distinction on which they proceed is extremely nice, and there has been much diversity of opinion as to the limits within which it should be applied. In *Liggins v. Inge*, 7 Bingham, 682, a license to divert the water from the plaintiff's mill, by a weir, erected higher up the stream on the land of the defendant, was held to be a good answer to an action brought to recover damages, for the nuisance occasioned by the continuance of the weir, notwithstanding the objection, that the right to the natural flow of the water was an incorporeal hereditament, which could not be extinguished or transferred without a grant or release under seal. The court took the distinction, that although the plaintiff could not have given a right to the water without a deed, yet that, when he consented that those under whom the defendant claimed might divert a portion of the stream, by means of the weir, and they acted on the faith of the permission, it became irrevocable, and that the plaintiff could neither retract it subsequently, nor compel the defendant to incur the expense of restoring things to their former condition. "We do not," said Chief Justice Tindal, in the course of his opinion, "consider the object, and still less the effect, of the parol license, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, the quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing

the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition."

It seems also, to have been thought, that even if the license was revocable, the acts done under it while unrevoked would still be good, and that the defendant would not be bound to incur the expense and trouble of demolishing a structure, which he had full authority for erecting.

A similar view was taken in *Addison v. Hack*, 2 Gill, 521, and consent to the diversion of the water of a stream, by a structure erected on the land of the licensor, held to be irrevocable after it had been acted upon, without a tender of the sum which had been laid out on the faith of the license. There was said to be a manifest difference between the extinguishment of an easement, which might take place by parol or through acts in *pais*, and the creation of one which could only be by deed.

The doctrine was applied in *Morse v. Copeland*, 2 Gray, 204, where Metcalf, J., said, "It is a rule of law, that an easement, whether acquired by known grant or by prescription, may be extinguished, renounced, or modified by a parol license, granted by the owner of the dominant tenement, and executed by the owner of the servient tenement. The authorities on this point are conclusive. *Dyer v. Sandford*, 9 Met. 395; *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682, and 5 Moore & Payne, 712; *Addison v. Hack*, 2 Gill, 221. These authorities show that the doctrine sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses, which if given by deed would create an easement, but to licenses which if given by deed, would extinguish or modify an easement. They also show that the distinction, sometimes taken between a license to do acts on the licensee's land, and a license to do acts on the licensor's land, is the same distinction that is made between licenses which if held valid would create, and licenses which extinguish or modify an easement. Generally, if not always, a license which when executed extinguishes or modifies an easement, is from the nature of the case, a license to do acts on the servient tenement, the tenement of the licensee. See Gale & Whately on Easements, Pt. 1, c. 3, sect. 1."

In Gale & Whately's Law of Easements, 29, the result of all the decided cases is said to be that "a man may, in some cases, by parol license, relinquish a right which he has acquired in addition to the ordinary rights of property, and thus restore his own and his neighbor's property to their original and natural condition, but that he cannot by such means impose any burden upon land, in derogation of the ordinary rights of property. A parol license to build a wall in front of the ancient windows of the licensor, might be irrevocable

within this distinction, while a similar permission to turn a spout on his land, from a neighboring house, could be recalled at pleasure."

The case of *Liggins v. Inge* will hardly bear the application of this criterion, because the license operated to extinguish a privilege inherent in the title of the licensor. It was virtually a grant, by which a right indisputably his, was transferred to, and became vested in the licensee.

The use and enjoyment of running water is a valuable incident to the ownership of land, requiring to be guarded with as much watchfulness as any other. *Haight v. Prince*, 21 New York, 241. If part of a stream can be diverted, through the execution of a parol license, the whole may be turned aside in the same manner. It would seem that greater care is requisite, when the acts by which the right is divested are done elsewhere, than when they pass before the eyes of the licensor, because he may not know what is taking place, until it is too late to object. When possession is given under an oral contract, the act is unequivocal and written evidence may be dispensed with, but the case is obviously different when a man seeks to charge the land of another by an act done on his own premises; and in *Woodward v. Seely* (ante, 577), the court held that the erection of a dam on the premises of the complainant, under an alleged license was not such an execution of the contract as would take the case out of the statute of frauds, or entitle him to an injunction restraining the respondent from asserting his title. The question is, however, one of circumstances; and where it appears indisputably that the plaintiff sanctioned the structure of which he complains, he will be precluded from objecting to it, whether it stands on his land or that of the defendants. *The Occum Co. v. The Sprague Manufacturing Co.*, 34 Conn. 524; *Stephens v. Benson*, 19 Indiana, 368.

The judgment in *Liggins v. Inge*, seems to have been influenced by the idea, which has since been rejected in England as unsound, that running water is a gift of nature which may be appropriated by the first comer. See *Ward v. Ward*, 3 Excheq. 748, 761, 774. The plaintiff parted with a valuable inherent right, which was as much a part of his title as the land itself, and what he resigned vested in the defendant. The transaction operated, therefore, as a grant or transfer rather than a release or extinguishment. The defendant was clearly entitled to relief in equity, and the decision may have been prompted by the natural wish of a good judge, *ampliari jurisdictionem*. But the doctrine which it laid down has not only been adopted in this country, but held to justify the conclusion that a man who erects a structure on his own land in pursuance of a license given by another, cannot be obliged to take it down, even when the necessary effect of treating the license as irrevocable is to subject the land of the licensor to a charge, and vests a corresponding right in the licensee. Thus, in *Clement v. Dur-*

*gin*, 5 Greenleaf, 9; *McKellip v. McIlhenny*, 4 Watts, 317, and *Woodbury v. Parshley*, 7 New Hampshire, 237, the plaintiff was held to be estopped from recovering damages for the overflow of his land by a dam erected on that of the defendant, by proof that he had consented to the erection of the dam, at the time when it was built, which was said to preclude him from requiring that it should be taken down, without refunding the expense which had been incurred in erecting it.

It has been held in like manner, in Massachusetts, that the right in question, in such cases, is a demand or chose in action, which does not partake of the nature of land, or fall within the provisions of the statute of frauds, and that it may consequently be extinguished without a writing, by acts in *pais*. *Seymour v. Carter*, 2 Metcalf, 520; *Smith v. Goulding*, 6 Cushing, 154.

The weight of authority, however, clearly is, that a right to flow the land of another is equally a hereditament, whether the dam or other structure by which the water is maintained above the natural level stands on the dominant or servient tenement, and cannot, therefore, be created without a writing under seal, unless the circumstances of the case take it out of the rule of the common law and the provisions of statute of frauds. *Thompson v. Gregory*, 4 Johnson, 81; *Richardson v. Hays*, 1 Gill & J. 266; *Carter v. Harlan*, 6 Maryland, 20; *Carlton v. Redington*, 1 Foster, 291; *Sidensparger v. Spear*, 17 Maine, 123; *Bridges v. Purcell*, 1 Dev. & Bat. 492.

In determining the nature of the right conferred by a license, regard must consequently be had to the effect which it will produce and not to the place where it is to be carried into execution; and an authority to flood the land of another, or turn the course of the stream upon it by means of an embankment on the land of the licensee, is virtually an easement within the rules governing the origin and transmission of estates in land. *Frost v. The Northampton R. R. Co.*, 23 Conn. 211. "We do not think," said Stover, J., "that the revocability of the license depends at all upon the circumstance, that the acts authorized by the plaintiff's grantor were to be done, if considered only in respect to their immediate or direct effect, upon land not owned by him, so long as the necessary and inevitable consequence of those acts would be an exercise, on the part of the defendants, of a right in the land of the grantor himself, and to restrict the dominion of the latter over it; a right which, if made indefeasible by a grant, would burden the land with a perpetual easement. In fact, the privilege conferred on the defendants was, in form, a license to build the culvert on the defendants' own land, but in substance a right to overflow the land of the licensor himself. To construct a culvert on lands adjoining their own, and really already under the defendants' control, by virtue of their character, was an act which, independently of its tendency to cause an



overflow upon the land of grantor, the defendants had an unquestionable right to do without his sanction, and which, in this view of the matter, was not done by virtue of his authority. What his license authorized was, that the company might, by means of the culvert, turn water upon his land; and this diversion was the subject of the license, rather than the mere construction of the culvert. The permission to build the culvert, which would necessarily cause the diversion of the water, was really a permission so to divert the water, and to affect the rights of the licensor in his own land. We cannot see why such a license should not be revocable, in the same manner as if the acts authorized to be done, were done on the premises of the licensor, and consequently producing the same effect there."

The question was critically examined in *Bridges v. Purcell*, by Gaston, J., who assigned the following reasons in giving judgment: "A license is a power or authority given to a man to do a lawful act. Unquestionably, no countermand can make the act done under it illegal.

"Here it was not a license to erect a dam, for no license was needed for any such purpose."

"It was a license, by means of a dam on his own land, to pond water on the land of him who gave the license. It is often difficult to distinguish between a license, or a mere authority, and an interest, or a license coupled with an interest. It necessarily follows, that what is done under either, while in force, is binding upon him who granted it. Until the license was revoked, the keeping of the water upon the land was lawful. It is a general principle, that a mere license may be countermanded; and it is equally a general principle, that an interest once passed, cannot be recalled. The extent of the grant, whether it be of an authority or an interest, depends not on any technical words, but upon the intention of the parties. Whether a license to do an act which, in its consequences, permanently affects the property of him who gives it, when so acted on, that what is done cannot conveniently be undone, may be regarded as the grant of an interest to the extent of the consequences thereby authorized, and therefore not revocable; or whether such a license does not necessarily imply a permission for the thing done to remain, notwithstanding the continuing consequences; and therefore the licensee, on a principle of good faith, may be forbidden to withdraw it, without indemnifying him who trusted thereto. Whether these, or either of these, principles, can or cannot be extracted from the adjudications, we are of opinion that they do not uphold the instructions complained of.

"The right to pond water on another's land, is an incorporeal hereditament, a right not indeed to the land itself, but to a privilege on and upon the land, impairing, to that extent, the dominion of the proprie-

tor therein. Set up as a permanent interest granted to the vendor of the plaintiff, transferable by him, passing with the lands to the defendants, it is inoperative, because it is a freehold interest, and cannot pass but by deed. Regarded as a mere license, however irrevocable, between the parties (if, indeed, there can be such without an interest), it is difficult to see how it can be binding between the plaintiff and the defendants. The ancestor of the plaintiff granted a license, and the plaintiff has succeeded to all his estate. Now, if the effect of the license be not to pass any interest out of, or impose any charge upon the land, the plaintiff has succeeded to an unlimited and unshackled fee simple therein. A mere authority necessarily ceases with the life of the grantor. The plaintiff's ancestor granted a license to the vendor of the defendants; but regarded as a license, how does it enure to the benefit of the defendants? If it passed as an appurtenance to the land, it partook of its nature; it was more than an authority—it was an hereditament. To hold that a permission thus given, shall operate forever for the benefit of the grantee and his assigns, against the grantor and his heirs, would be in effect, to permit a fee simple estate to pass under the name of an irrevocable license. Purchasers would never know what incumbrances were upon the lands, and instead of the solemn and deliberate instruments which the law requires, as the indispensable means of transferring freeholds, valuable landed interests would be made to depend wholly on the integrity, capacity, or recollection of witnesses."

It results from this language that even when such a license is irrevocable as between the parties, it will not be binding on third persons who acquire title subsequently by descent or purchase.

The law was so held in *Carlton v. Reddington*, 1 Foster, 291; *Carter v. Harlan*, 6 Maryland, 20; and *Seidensparger v. Spear*, 17 Maine, 23; and again, in *Frost v. The New Haven Railroad Company*, 23 Conn. 214, where the distinction taken in *Purcell v. Bridges*, between the situation of the parties and of those claiming under them as grantees was made the hinge of the judgment; while Lord Denman said, in *Perry v. Fitzhove*, 8 Q. B. 757, that if the person who gave the license was precluded from revoking it, the estoppel did not extend to a purchaser. And it has been held, in other instances, that the right given by a license is equally insusceptible of transfer before and after execution, and cannot be enforced by a subsequent grantee, even when essential to the enjoyment of the grant. *Carlton v. Reddington*, 1 Foster, 291; *Cowles v. Kendall*, 4 Foster, 364 (ante, 550).

This conclusion may be just in one aspect of the question, but there is another which should not be lost sight of. A license cannot, as such, even when reduced to writing, confer a permanent right in land. It is a power revocable at pleasure and operating only as between the licensee

and the licensor. But a license may, when sustained by a consideration growing out of the expenditure of time and money on the faith of the authority which it accords, take effect as a contract, and will then confer an indefeasible right, which may be made the subject of a grant or assignment. This is peculiarly true when land is in question, because the right is, under these circumstances, viewed by equity as an estate or interest and not as a chose in action. A license merely as such is, as we have seen, defeasible even as between the original parties. But if it is so far executed as to be binding on the licensor, it will be equally conclusive on volunteers and even purchasers with notice. It is well settled that when possession has been given under an oral contract of sale, it will be specifically enforced by equity, and the principle is the same when a valuable structure is erected on the land of another on the faith of a license. The middle ground taken in some of the cases would therefore seem to be untenable. A license is either an authority susceptible of being recalled at pleasure, or it is a right capable of transmission, and which may be enforced against every one who cannot show a better title. *Pope v. Hay*, 24 Vermont, 560; *McIlhenny v. McIlhenny*, 4 Watts, 317; *Liggins v. Inge* 7 Bing, 682; *The Occum Manufacturing Company v. The Sprague Manufacturing Company*, 34 Connecticut, 529.

In *Snowden v. Wilas*, 19 Indiana, 10, it was accordingly said, that although a license operating to confer an easement was revocable at law, and would be determined by a conveyance of the land on which it was to be exercised, such was not necessarily the rule in equity, which would on the contrary enforce a license which had been carried into execution at the cost of the licensee, if from the circumstances of the case an adequate compensation could not be made in damages. This would be done, first, because the licensor was equitably estopped, and next to compel the specific performance of a contract which had been so far executed that it could not be rescinded without fraud. Assignees would be as much bound as the original parties if they bought with notice, which might be inferred if the nature of the privilege was such, or it was so openly exercised that it could not escape the observation of a purchaser. Where equitable jurisdiction was distinct from legal, the remedy must be sought through an application to the appropriate forum for an injunction for a decree of specific performance. *Foster v. Browning*, 4 Rhode Island, 47. When, however, law and equity were administered through the same forms and by the same tribunals, the only question was whether a sufficient case was set forth in the pleadings and sustained by proof.

It was decided in like manner in *Davies v. Marshall*, 10 C. B., N. S. 697, that a declaration alleging the exclusion of light and air from ancient windows by a building erected on the defendant's land, and that

the defendant had deprived the plaintiff's house of the support to which it was prescriptively entitled, was sufficiently answered by an equitable plea, that the grievances complained of were occasioned by pulling down the defendant's house and erecting a new one, which the plaintiff had notice of, and that the defendant had expended large sums of money in making the change, with the knowledge and acquiescence of the plaintiff, and under a well founded belief that the latter would not object subsequently to what he did not forbid at the time. A similar view was taken in *Stephens v. Benson*, 19 Indiana, 368, and proof that the plaintiff stood by without objecting during the erection of the dam of which he complained, held to preclude him from recovering damages for the injury which it occasioned by overflowing his land. It will, however, be a good reply, under these circumstances, to show that the acquiescence of the plaintiff was procured by the false representation of the defendant. *Davis v. Marshall*.

\* These cases rest upon a principle which has frequently been enforced in equity, that a man who stands by and encourages another, though it be but passively, to lay out money, under an erroneous opinion of title, or with a well founded expectation of being allowed to enjoy that for which he pays, will not be permitted to deprive the latter of an advantage which he ought in good faith to retain. *Dunn v. Spurrer*, 7 Vesey, 291; *Powell v. Thomas*, 6 Hare, 300. Or, as the doctrine was stated by Lord Cottenham, in *Williams v. The Earl of Jersey*, 1 Craig & Ph. 97, "a party may so encourage that which he afterwards complains of as a nuisance, as not only to preclude himself from complaining of it in equity, but to give the adverse party a right to the interposition of a court of equity in the event of his complaining of the nuisance at law."

In *Pope v. Hay*, 24 Vermont, 560, the possession of the plaintiff was held to be sufficient notice of his equity to a house which he had erected on the faith of a license, to entitle him to a decree quieting his title against the defendant who had bought the land from the licensor.

Possession will not, however, operate as notice unless it is sufficiently distinct and unequivocal to put the buyer on his guard. 2 Leading Cases in Equity, 166, 3 Am. ed. The natural inference from seeing a house or other structure is, that it belongs to the owner of the soil; and the purchaser need not inquire further unless the building is used or occupied by the equitable owner (ante, 544). It has, however, been said that a man who buys land flooded by a dam erected on the close of a neighboring proprietor, ought to inquire how the easement originated, and by what right it is maintained, and cannot allege his ignorance of that which he might have ascertained. *McKellip v. McIlhenny*, 4 Watts, 317; *Strickler v. Tod*, 10 S. & R. 63; while in *Addison v. Hack*, 2 Gill, 221, the grantee of a tract of land, was held to have constructive

notice that the diversion of part of the water of a brook which flowed through it, by a structure erected higher up the stream had taken place under a license from the grantor. And it is well established on general principles, that a purchaser will be affected with all the consequences of an equity, whenever the circumstances are such as to put him on inquiry and afford the means of arriving at the truth. 2 Leading Cases in Equity, 152, 3 Am. ed.

It is conceded that the right arising from the execution of a license is limited by the purpose which the parties had in view, and will terminate when the causes which called it into being cease. Hence a license to erect a temporary structure will not be a justification for the occupation of the land after the decay or removal of the structure; *Carleton v. Reddington*, 1 Foster, 291; *Cowles v. Kidder*, 4 Id. 364; *Couch v. Burke*, 2 Hill, S. C. 534. The law was so held in *Hepburn v. McDowel*, 17 S. & R. 383, and the decay of a dam said to exhaust the authority under which it was erected, and leave the defendant liable to an action for the subsequent erection of another in its place. When, however, a man authorizes the erection of a structure on his land in furtherance of a general design, which is carried into execution in the belief that he will adhere to his word, the mere circumstance that the structure is swept away or fails through natural causes, is not a sufficient reason why it should not be restored (ante). If, for instance, the motive for licensing the erection of a dam, were to afford a supply for water for a mill, which was subsequently built in reliance on the license, the dam might no doubt be repaired from time to time as long as the mill remained.

It is well settled, that as the right growing out of the erection of a house or dam on the land of another is a mere equity, it cannot be enforced against a purchaser without notice. Even when such a structure stands on temporary or movable foundations, and may be taken down without injury to the freehold, it will obey the general rule, that fixtures are a part of the freehold, and pass with it to a grantee. 2 Smith's Leading Cases, 6 Am. ed. 287; *Davis v. Buffum*, 51 Maine, 160; *Byassee v. Reese*, 4 Metcalf, Ky. 372; *Brennan v. Whitaker*, 15 Ohio, N. S. 446; *Landon v. Platt*, 34 Conn. 517; *Bringholfe v. Muzenmaier*, 20 Iowa, 513. In *Landon v. Platt*, an authority to erect and occupy a barn on the land of the licensor, with a right to remove it if the land was sold, was accordingly said to confer a mere equity which could not be enforced against a *bona fide* purchaser. If, as some of the decisions indicated, a building resting on a movable foundation, was personal property in England, a different rule prevailed in Connecticut, where such a doctrine would seriously disturb titles by converting a large number of dwellings in the State into chattels.

One of the best established rules of the common law requires, that

an obligation should not be dissolved by any means of less degree than those through which it arose. While, therefore, an executory parol contract may, even when reduced to writing, be rescinded orally at any time before breach; *Foster v. Dawber*, 6 Excheq. 839; specialties are governed by a different principle, and cannot be varied or annulled by a subsequent agreement which is not written and under seal. 1 Smith's Leading Cases, 557, 574, 6 Am. ed. This is true as it regards the obligation of the contract; but there appears to be no sufficient reason why a license should not be a justification for an act done or omitted while it is still standing and unrevoked. The maxim *consensus tollit injuriam*, is of general application when the alleged wrong is not *malum in se*, and would seem to be equally in point, whether the default consists in the violation of a vested right, or one arising under an executory agreement. If, for instance, a man who had agreed to deliver coal or lumber on a given day, were told by the covenantee not to bring it till next month, the latter should not be allowed to recover damages for a delay which he has sanctioned. He may indeed change his mind and require the covenantor to proceed forthwith, but the license should still be a defence for the failure to deliver the goods at the time prescribed. To hold otherwise, is to ascribe a greater sanctity to an executory agreement than to the vested right arising under it when fulfilled. If the right conferred by a conveyance can be waived orally after the execution of the deed, such a license should be equally effectual, when there is a mere agreement to convey. *Pierrepoint v. Barnard*, 5 Barb. 364, 2 Selden, 279. The maxim *volenti non fit injuria* seems to be equally applicable, whether the alleged wrong consists in the non performance of a contract, or an entry on land. *Watchman v. Cook*, 5 Gill & J. 289.

This argument may be sound on general principles. Reasoning technically from the rule, that the obligation of contracts must be dissolved in the same manner that it was formed, we should be led to a different conclusion. The covenantor is bound to fulfil the contract according to its letter at the time, and in the mode prescribed. If he is discharged from this, the force of the original agreement is at an end, and the obligation, if any, arises from a new contract, contrary to the rule, that a sealed instrument cannot be varied by parol. If the license operates as a release it should be pleaded as such, if it does not, it will not be a defence merely as a license. *Dobson v. Esquiv*, 2 Hurlstone & N. 79.

It is accordingly established in England, that a breach of covenant, cannot be excused by showing that it was committed under an authority given by the covenantee. *Sellers v. Bickford*, 8 Taunton, 31; *Cordwent v. Hunt*, 1b. 596; *Thompson v. Brown*, 7 Id. 756; *West v. Blake-way*, 7 M. & G. 729. In *Sellers v. Bickford*, a plea of leave and license

was held an insufficient answer to any action on a covenant not to open a shop within three-quarters of a mile of that kept by the plaintiff. It was said that a contract under seal, could not be varied by any means of less solemnity, and that the defence set up was consequently invalid. As a license to open a shop on the plaintiff's land, would confessedly have been valid, this decision shows that a defence which would be good in trespass, may not be a justification for the non-fulfilment of an agreement. The point was decided in the same manner not long afterwards in *Cordwent v. Hunt*, where it arose on a plea to a suit for not erecting a threshing mill as the defendant had covenanted, that the plaintiff had requested the defendant not to erect the mill, until he should be notified by the plaintiff.

These decisions were followed in *West v. Blakeway*, under circumstances of great hardship to the unsuccessful party. The controversy arose out of a covenant by a lessee, to yield and surrender up at the end of the term, all buildings or improvements made or put up during its continuance; and the breach alleged was, that a green house, which had been erected during the term, had been pulled down and carried away, contrary to the intent and meaning of the covenant. The defendant pleaded, that he assigned all his right, title, and interest in the term to one Hicks, who entered and became possessed of the premises by virtue of the assignment; that the plaintiff and Hicks agreed that Hicks might erect a green house on the premises, and remove it subsequently if he thought proper; and that Hicks did the acts complained of in the declaration under and by virtue of the agreement. This plea was proved at the trial, by the production of the correspondence between the plaintiff and Hicks, and a verdict found in accordance with the evidence; and the case came before the court on a motion for judgment, *non obstante veredicto*, which was decided in favor of the plaintiff, notwithstanding the learned argument of the defendant's counsel, who said that the law revolted at the proposition, that a covenantor should first authorize a breach of the covenant, and then sue the covenantor for the default. It seems to have been conceded, that a man cannot recover damages for an act done by his orders, and which is virtually his own; but a license or permission was held to rest on a different footing, and form no sufficient excuse for the breach of an agreement under seal. "This plea," said Tindal, C. J., "appears to me to set up that which is merely a parol license. Now, it is a well known rule of law, that *unumquodque, ligamen, dissolvitur, eodem ligamine quo et ligatur*. This is so well established, that it appears to me unnecessary to refer to cases. I will mention only *Rogers v. Payne*, 2 Wils. 376, which was an action of covenant for non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held, upon demurrer, that the covenant could not be discharged

without a deed; and *Blake's Case*, 6 Co. Rep. 43 b., was cited. Now, if an action had been brought against the assignee, to have set up this defence would have been in direct violation of the rule to which I have adverted. How can it be an answer for the lessee, if not for the assignee?"

This decision marks the incongruity of holding a license less effectual when a chose in action is in question, than when it operates on a vested interest. If the green house had been surrendered in accordance with the covenant, a permission to take it away would have been a conclusive answer to a suit brought to recover damages for the asportation. The unavoidable inference therefore is, that a right may be waived after it is perfected, by means that would not suffice while it rests in contract. The law has been held the same way in the United States in several instances. *Miller v. Elliot*, 1 Carter, 484; *Woodruff v. Dobbins*, 7 Blackford, 582. But the weight of authority is in favor of the doctrine that a recovery cannot be had for an act which the plaintiff has authorized or sanctioned, whether the alleged wrong consists in the breach of an executory agreement, or an entry on land. In *The U. S. v. Howell*, 4 C. C. R. 620 (ante, 422), Washington, J., was accordingly of opinion, that a dispensation with the payment of a bond at the day fixed by the condition, might not only be a defence as between the parties, but discharge third persons who were answerable as sureties or guarantors.

Similar ground was taken in *Fleming v. Gilbert*, 3 Johnson, 528, where the action was brought on a bond conditioned that the defendant should produce and deliver up a mortgage at a specified time, and should procure the same to be discharged on the records of the county; and the defence set up was, that the mortgage had been produced and tendered, and an inquiry made of the plaintiff, what further steps should be taken for the performance of the residue of the condition, who, in reply, directed the mortgage to be placed in the hands of a third person, and said that nothing further need be done for the present. This was held by the court to be a good answer to the action, by showing that the plaintiff had sanctioned the breach for which he sought to recover. "The condition of the bond substantially is," said Thompson, J., "that the defendant should, by a certain day, procure and deliver to the plaintiff a bond and mortgage which he had given to Isaiah Gilbert, and to discharge the same from the record; the defendant, within the time limited, did procure the bond and mortgage, and tendered and offered them to the plaintiff; and did also offer to do whatever the plaintiff should require for the further discharge of the bond and mortgage, or the record thereof; but the plaintiff, not knowing at the time what was further necessary, did discharge the defendant from the strict and literal performance of the bond, and entered



into another engagement respecting the further proceedings. The plaintiff's conduct can be viewed in no other light than a waiver of a compliance with the condition of the bond, so far as it related to a discharge of the mortgage on record; and I see no infringement of any rule or principle of law, in permitting parol evidence of such waiver. It is a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable, that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond. We find the rule above alluded to recognized in ancient as well as in modern decisions. Thus, where the condition of a bond was to raise a mill, the obligor came to the obligee, and told him everything was ready to erect the mill, and asked him when he would have him come and put it up; the obligee answered, that he would not have it; and discharged him entirely of the erecting of the mill; and that was held sufficient to excuse him from the performance. 1 Roll. Abr. 453, pl. 5; Year Book, 2 Hen. 6, 37.

"So, also, in an action of covenant upon a charter party for demurrage, where it appeared that the ship owner had waived all claim to demurrage, and consented that the time should be enlarged within which the cargo was to be discharged, Lord Kenyon said, that if the matter had been properly pleaded it would have been a good and legal defence against any claim for demurrage (1 Esp. Cas. 35). Upon the same principle it is, that a tender and refusal or waiver (which must always rest in parol) is equivalent to an actual performance (1 Stra. 535, Doug. 661); and in *Keating v. Price* (1 Johnson's Cases, 23), this court allowed evidence of parol agreement to enlarge the time of performance of a written contract."

This decision was followed in *Langworthy v. Smith*, 2 Wend. 587; *Leavitt v. Savage*, 17 Maine, 72; *Esmond v. Benschotten*, 12 Barbour, 366; *The Mayor of New York v. Butler*, 1 Id. 527; *The Franklin Fire Insurance Co. v. Hamill*, 5 Maryland, 170; *Holmes v. Fisher*, 13 New Hampshire, 9, and *Stickney v. Stickney*, 1 Foster, 61; which all proceed on the ground that a parol license may excuse the non-performance of an agreement under seal; and in *Stickney v. Stickney*, the court held that when the obligation of a bond conditioned for the support of the obligee, was suspended by a dispensation, it would not revive until the obligee was notified that the waiver was withdrawn, and that he must proceed as the bond required.

In *Pierrepoint v. Barnard*, 5 Barb. 664, 2 Selden, 279, the plaintiff sought to recover damages for the breach of a covenant in a contract of sale, not to fell the timber before the execution of the deed, without

the written consent of the vendor. The defence was that the vendee had acted under an oral authority to cut down the trees and saw them into planks. It was said that whether the alleged wrong consists in the invasion of a vested interest, or the non-fulfilment of an agreement, there can be no recovery in opposition to proof that it was sanctioned by the plaintiff. The defendant had agreed not to exercise the right conferred by the contract, except on certain terms; but this did not preclude him from accepting the unconditional authority which the plaintiff subsequently thought fit to give. This view was adopted by the court who gave judgment for the defendant.

There may be reason to doubt the soundness of this decision, which may be thought to go too far in setting aside not only the obligation of the seal, but the stipulation which required a writing.

The common law makes no distinction between verbal and written contracts, and an agreement in writing may be varied orally at any time before breach. It seems, however, to be generally conceded that when a contract contains an express provision that no alteration shall be made except in writing, it cannot be changed in any other way. A tenant who covenants not to underlease or assign without the written consent of the lessor, must adhere literally to his contract, and cannot rely on an oral license as an excuse for a violation of the lease; *Rowe v. Gregson*, 2 Term, 425; *Littler v. Holland*, 3 Id. 590; and equity will not, it has been said, relieve under these circumstances, unless it is made to appear not only that the tenant was under a false impression, but that he was intentionally misled by the landlord. *Richardson v. Evans*, 3 Maddox, 218, 1 Smith's Leading Cases, 88, 6 Am. ed. And it has been held repeatedly that a verbal authority or notice will not be sufficient under a policy of insurance which requires a written memorandum or endorsement (notes to *Carpenter v. The Washington Ins. Co.*, post). The reason is because the parties have a right to fix the evidence beforehand, and refuse to trust to the uncertain testimony of witnesses.

The doctrine that a sealed instrument cannot be varied by parol depends on the same principle. The object of the parties in affixing the seal may reasonably be supposed to be to place the contract beyond the reach of change by any means of less solemnity. And if so, their intention should prevail not only at law, but in equity, unless the circumstances are such as to create an exception to the general rule. *Patrick v. Adams*, 3 Williams, 376.

From the authorities taken as a whole, we may deduce the following conclusions: The right to damages for the non-fulfilment of an instrument under seal, may be extinguished after breach by an accord and satisfaction, but an agreement before breach to accept a substituted performance, will not be a justification for a failure to execute the cove-

nant as it was originally made. *Patrick v. Adams*; 1 Smith's Leading Cases, 557, 574, 6 Am. ed. Such an accord is not only inoperative while executory, but cannot be pleaded or given in evidence as a bar after it has been carried into execution. *Spencer v. Healy*, 8 Exchequer, 668; *The Mayor of Berwick v. Oswald*, 1 Ellis & Bl. 295. When, however, such a dispensation has been so far acted on that it cannot be recalled without fraud, it will, like an executed license, have the binding force as an estoppel, which it wants as a contract. *Monroe v. Perkins*, 9 Pick. 298; *Lawrence v. Dole*, 11 Vermont, 549; *Pierrepoint v. Barnard*; *Hoffman v. Lee*, 3 Watts, 352, 356.

In *Pike v. Butler*, 4 Barb. 654, the controversy arose out of mutual covenants by the tenant to build in the way prescribed, and by the landlord to pay for the house at the end of the term. The building was not in accordance with the lease, and the lessor relied on this as a reason why he should be released on his part. But the court held, that inasmuch as he had looked on without objecting while the house was going up, and had expressed his satisfaction with it afterwards, he was bound to make the stipulated payment. It was said to be clear, under the authority of *Lefevre v. Lefevre*, 4 S. & R. 241, and on general principles, that a man will not be allowed to take advantage of a failure or variation in the performance of a contract which was induced by his acts or language.

The relief obtained in *Pike v. Butler*, was through a bill filed on the ground of a want of remedy at law; but the same end may be attained in a legal tribunal through the doctrine of equitable estoppel, which as now administered, operates as an informal injunction on the assertion of rights which cannot be enforced consistently with equity and good conscience.

-In *Lawrence v. Dole*, 11 Vermont, 549, the courts said, that although an oral dispensation was like a license, essentially revocable, it still could not be recalled after the party had gone too far under it to retreat without injury, and in *Pierrepoint v. Barnard*, an oral authority was, as we have seen, held valid, although the defendant had covenanted that he would not exercise the privilege without the written consent of the plaintiff. The burden of proof is, however, on the person who relies on a parol waiver or modification of an agreement under seal, and he must show that the circumstances require the interposition of equity to sustain a defence which is not tenable at law. *Patrick v. Adams*, 3 Williams, 376.

The rule that a man cannot take advantage of a default which he has sanctioned, applies where the breach of a condition precedent is made the ground of a refusal to fulfil the agreement on the other side. *Pike v. Butler*, 4 Barb. 654; *The Mayor of New York v. Butler*, 1 Id. 325. Under these circumstances, however, the party who seeks to

enforce performance should, instead of declaring in covenant and alleging the waiver as excuse, bring an action of assumpsit on the new agreement, which has in effect superseded the old. For, as the plaintiff cannot recover under these circumstances without a recourse to parol evidence, he will necessarily be unsuccessful in a form of action which must be based exclusively on a writing under seal. It was accordingly held in *Thompson v. Brown*, 7 Taunton, 756, that the plaintiff could not recover in an action of covenant without proving an exact compliance with the conditions of the charter party on which he sued. And the same point was decided in *Liller v. Holland*, 3 Term, 590, although the variation was limited to an extension of the time originally fixed for performance. Kenyon, C. J., said that the case was a clear one. The declaration charged that the parties had stipulated by deed for a specific thing on a day certain. Then, if the plaintiff who sued on that contract, was not bound to prove it as laid, the defendant had no notice of what he was called upon to answer. In an action brought many years before by Mr. Garrick, or one of the managers of the theatre, against Barry, for not performing his contract, it appeared on the trial that the manager had given the defendant a parol license to be absent, but, as the articles on which the action was founded required such a license to be in writing, the court held that it could not be dispensed with, and that the parol agreement was no answer to the plaintiff's action, though, perhaps, the defendant had another remedy in a court of equity.

4 The earlier authorities in this country generally accord with those in England, that in order to maintain a covenant the plaintiff must aver and prove an exact compliance with the stipulations and provisions which are conditions precedent to the right of suit. *McVoy v. Wheeler*, 6 Porter, 201; *Raymond v. Fisher*, 6 Missouri, 291; *Vicary v. Moore*, 2 Watts, 451; *Porter v. Stewart*, 2 Aiken, 417; *Sherwin v. The Rutland and Burlington Railroad Company*, 24 Vermont, 347; *Watchman v. Crook*, 5 Gill & J. 239; *Sinard v. Patterson*, 3 Blackford, 353; *Shaw v. Hurd*, 3 Bibb, 371; *Langworthy v. Smith*, 2 Wend. 587; *Phillips v. Rose*, 8 Johnson, 392; *Freeman v. Adams*, 9 Id. 110. Some of the more recent decisions, however, take the ground that a defendant cannot make a breach which he has sanctioned an excuse for the non-fulfilment of the agreement on his part; and this would seem to be the better, if not the more technical, view of the law. *The Mayor of New York v. Butler*, 1 Barb. 325; *Storer v. Sprague*, 12 Id. 366; *French v. New*, 20 Id. 48; *Jewell v. Blandford*, 7 Dana, 472; *Smith v. Edwards*, 6 Vermont, 687. Prevention is admitted to be an excuse for non-performance under all circumstances, and there is but little difference between causing and authorizing a default. That which a man authorizes, is for most purposes as much his own act as that which he does,

because his will is the efficient cause in either case, and he may justly be held responsible for the result in both. It was held accordingly in *McCombs v. McKennan*, 2 W. & S. 216, that the defendant could not accept a modified performance, and then set up the failure of the plaintiff to comply with the contract in its original form as a bar.

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## JUDGMENTS OF OTHER STATES.

## MILLS v. DURYEE.

In the Supreme Court of the United States.

FEBRUARY TERM, 1813.

[REPORTED, 7 CRANCH, 481-487.]

*Nil debet is not a good plea to an action founded on a judgment of another State.*

Absent.—TODD, J.

ERROR to the Circuit Court for the District of Columbia in an action of debt upon a judgment of the Supreme Court of the State of New York, to which the defendant below pleaded *nil debet*, which plea, upon general demurrer, was adjudged bad.

By the Constitution of the United States, Art. 4, Sect. 1, it is declared, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The act of May 26th, 1790, vol. 1, p. 115, after providing the mode by which they shall be authenticated, declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

And by the supplementary act of March 27th, 1804, vol. 7, p. 153, § 2, it is declared that the provisions of the original act of

26th May, 1790, shall apply as well to the records and courts of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the records and courts of the several States.

*F. S. Key*, for plaintiff in error.

The true construction of that part of the Constitution and laws of the United States will confine their operation to *evidence* only, and will not justify such an alteration in the rules of pleading. The "effect" to be given to such copies is their "effect" as *evidence*; for it is not pretended that an execution could issue here upon such a record.

If *nul tiel* record is the proper plea, or could be pleaded in such a case, there are no means of procuring and inspecting the original record (which is essential under such an issue); and the Constitution and law not having provided for this, it must be presumed did not intend it.

The record in this case is not the *original*; it is certified and authenticated as a *copy*; and, therefore, unless entitled to *more* faith and credit here than in New York, it could not be offered to the court upon the plea of *nul tiel* record, for under that issue this record, even in New York, would not be admitted. The original must be produced and inspected.

But if this record would be entitled to such consideration in *another State*, by force of the Constitution and law, it is not entitled to it in this *district*, which is not a *State*. 1 Dal. 261, *Phelps v. Holker*; Id. 188, *James v. Allen*; 1 N. Y. T. R. 460, *Hitchcock v. Aicken*; 1 Mass. T. R. 401, *Bartlett v. Knight*.

*Jones*, contra.

It is admitted that a record authenticated pursuant to the act of Congress is to have the *effect of evidence only*; but it is evidence of the *highest nature*, viz., *record evidence*.

In every case of debt or contract, the form and effect of the plea are determined by the *dignity* of that debt or contract; in other words, by the dignity of the *evidence*, whether it be of record by specialty or simple contract.

The act of Congress makes the authenticated exemplification of the record equivalent to the *original record* in its proper State, and communicates to it the same *effect* as *evidence*, thereby making it capable of sustaining the same averments in pleading, and of

abiding the same tests as the original record. It therefore cannot be denied or controverted by any plea, such as *nil debet*, which goes to put in issue before the jury the matters averred by the record, and the existence of the record itself; but the defendant must either distinctly deny the record, or avoid it by pleading *per fraudum*, satisfaction, &c.; 2 Dall. 302, *Armstrong v. Carson*.

In allowing this conclusive effect to the evidence of the authenticated record, it is immaterial that it has not the further effect of enabling the ministerial officers of the law to issue an execution thereon, for that objection would be equally valid against the record when used in its proper *State*, but out of the jurisdiction of its proper court; and also against the sentences of foreign courts of admiralty under the law of nations.

The act of Congress communicates to the authenticated record the effect of record evidence in all courts *within* the United States, and does not limit it to the court in any *State*, as supposed by the plaintiff in error.

*March 11.*—STORY, J., delivered the opinion of the court as follows:—

The question in this case is, whether *nil debet* is a good plea to an action of debt brought in the courts of this district, on a judgment rendered in a court of record of the State of New York, one of the United States.

The decision of this question depends altogether upon the construction of the Constitution and laws of the United States.

By the Constitution it is declared, that “full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

By the act of 26th May, 1790, ch. 11, Congress provided for the mode of authenticating the records and judicial proceedings of the State courts, and then further declared that “the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.”

It is argued that this act provides only for the admission of such records as *evidence*, but does not declare *the effect* of such evidence when admitted. This argument cannot be supported. The act

declares that the record duly authenticated shall have such faith and credit as it has in the State court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz., *record evidence*, it must have the same faith and credit in every other court. Congress have therefore declared the *effect* of the record by declaring what faith and credit shall be given to it.

It remains only then to inquire, in every case, what is the effect of a judgment in the State where it is rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that State. It must, therefore, be conclusive here also.

But it is said that, admitting that the judgment is conclusive, still *nil debet* was a good plea; *nul tiel* record could not be pleaded, because the record was of another State and could not be inspected or transmitted by *certiorari*. Whatever may be the validity of the plea of *nil debet* after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel* record; and when Congress gave the effect of a record to the judgment it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection by the court of its own record, or an exemplification would be in any other court of the same State. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged that the record could not be inspected. The law, however, is undoubted that an exemplification would, in such case, be decisive. The original need not be produced.

Another objection is, that the act cannot have the effect contended for, because it does not enable the courts of another State to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same State where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete



and perfect, and have full effect, independent of the right to issue execution.

The last objection is, that the act does not apply to courts of this district. The words of the act afford a decisive answer, for they extend "to every court within the United States."

Were the construction contended for by the plaintiff in error to prevail, that judgments of the State courts ought to be considered *prima facie* evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision.

On the whole, the opinion of the majority of the court is, that the judgment be affirmed with costs.

JOHNSON, J.

In this case I am unfortunate enough to dissent from my brethren.

I cannot bring my mind to depart from the canons of the common law, especially the law of pleading, without the most urgent necessity. In this case I see none.

A judgment of an independent, unconnected jurisdiction is what the law calls a foreign judgment; and it is everywhere acknowledged that *nil debet* is the proper plea to such a judgment. *Nul tiel* record is the proper plea only when the judgment derives its origin from the same source of power with the court before which the action on the former judgment is instituted. The former concludes to the country, the latter to the court, and is triable only by inspection.

If a different decision were necessary to give effect to the 1st section, 4th article of the Constitution, and the act of 26th May, 1790, I should not hesitate to yield to that necessity. But no such necessity exists; for, by receiving the record of the State court properly authenticated as conclusive evidence of the debt, full effect is given to the Constitution and the law. And such appears, from the terms made use of by the Legislature, to have been their idea of the course to be pursued in the prosecution of

the suit upon such a judgment. For *faith* and *credit* are terms strictly applicable to evidence.

I am induced to vary in deciding on this question from an apprehension that receiving the plea of *nul tiel* record may, at some future time, involve this court in inextricable difficulty. In the case of Holker and Parker, which we had before us this term, we see an instance in which a judgment for \$150,000 was given in Pennsylvania upon an attachment levied on a cask of wine, and debt in judgment brought on that judgment in the State of Massachusetts. Now if in this action *nul tiel* record must necessarily be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting, then, the object of the Constitution by removing all cause for State jealousies, nothing could tend more to enforce them than enforcing such a judgment. There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance, or not subject to their jurisdiction by being found within their limits. But, if the States are at liberty to pass the most absurd laws on this subject, and we admit a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to that article of the Constitution in direct hostility with the object of it.

I will not now undertake to decide, nor does this case require it, how far the courts of the United States would be bound to carry into effect such judgments; but I am unwilling to be precluded by a technical nicety from exercising our judgment at all upon such cases.

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WILLIAM MCELMOYLE, FOR THE USE OF ISAAC S. BAILEY,  
v. JOHN J. COHEN, ADMINISTRATOR OF LEVY FLORENCE.

In the Supreme Court of the United States.

JANUARY TERM, 1839.

[REPORTED, 13 PETERS, 312-330.]

*A judgment of one State has no force in another, save that which it derives from the laws of the latter, or from the Constitution of the United States, which only provides that it shall have full faith and credit, and not for the manner in which it shall be carried into effect, nor for the nature or extent of the remedies for its execution. Hence, the judgment of another State, does not rank higher than a simple contract debt, in the administration of the estate of an intestate, unless placed in a higher rank by the laws of the State in which the question arises; and a statute of limitations of one State, may be pleaded to an action of debt brought on the judgment of another.*

MR. JUSTICE WAYNE delivered the opinion of the court.

This cause has been brought to this court, upon a certificate of division of opinion between the judges of the Sixth Circuit Court, upon the following points.

1. Whether the statute of limitations of Georgia can be pleaded to an action in that State, founded upon a judgment rendered in the State of South Carolina?

2. Whether, in the administration of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note against the intestate, when in life, should be paid in preference to simple contract debts?

Upon neither of these points does the court entertain a doubt.

Upon the first of them, we observe, though a judgment obtained in the court of a State is not to be regarded in the courts of her sister States as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in

this, that by the first section of the fourth article of the Constitution, and by the act of May 26th, 1790, section 1, the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed. It must be obvious, when the Constitution declared that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another State. The authenticity of a judgment and its effect, depend upon the law made in pursuance of the Constitution; the faith and credit due to it as the judicial proceeding of a State, are given by the Constitution, independently of all legislation. By the law of the 26th of May, 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit. It must be conceded, that the judgment of a State court cannot be enforced out of the State by an execution issued within it. This concession admits the conclusion, that under the first section of the fourth article of the Constitution, judgments out of the State in which they are rendered, are only evidence in a sister State that the subject matter of the suit has become a debt of record, which cannot be avoided but by the plea of *nul tiel* record. But we need not doubt what the framers of the Constitution intended to accomplish by that section, if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect, *rei judicate*; throughout Europe, in England, and in these States, when our first confederation was formed. On the Continent it was then, and continues to be, a vexed question, determined by each nation, according to its estimate of the weight of authority to which different civilians and writers upon the laws of nations are entitled. In England, it was an open question, having on both sides her eminent equity, common law, and ecclesiastical jurist. It may still be considered, in England, a controverted question, so far as

jurists and elementary writers on the common law are concerned ; though the adjudications of the English courts have now established the rule to be, that foreign judgments are *prima facie* evidence of the right and matter they purport to decide.

In these States, when Colonies, the same uncertainty existed. When our revolution began, and independence was declared, and the confederation was being formed, it was seen by the wise men of that day, that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each State, in all the States, would produce such intimate relations between the States and persons, that the former would no longer be foreign to each other in the sense that they had been, as dependent provinces ; and that, for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgment obtained in the different States. Accordingly, in the Articles of Confederation, there was this clause : " Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." Now, though this does not declare what was to be the effect of a judgment obtained in one State in another State, what was meant by the clause may be considered as conclusively determined, almost by contemporaneous exposition. For, when the present Constitution was formed, we find the same clause introduced into it with but a slight variation, making it more comprehensive ; and adding, " Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof:" thus providing in the Constitution for the deficiency which experience had shown to be in the provision of the Confederation ; as the Congress under it could not legislate upon what should be the effect of a judgment obtained in one State in the other States. Whatever difference of opinion there may have been as to the interpretation of this article of the Constitution in another respect, there has been none as to the power of Congress under it, to declare what shall be the effect of a judgment of a State court in another State of the Union. Here, again, we have cotemporaneous legislative interpretation of the first section of the fourth article of the Constitution ; for by the act of 1790, May 26th, it was declared, " That the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of

the State from whence the said records are or shall be taken." What faith and credit, then, is given in the States to the judgments of their courts? They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered. In other words, as has been said by a commentator upon the Constitution: "If a judgment is conclusive in the State where it is pronounced, it is equally conclusive, everywhere, in the States of the Union. If re-examinable there, it is open to the same inquiries in every other State." Story's Com. 183. It is, therefore, put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim, or subject matter of the suit. When, therefore, this court said, in *Mills v. Duryee*, 7 Cranch, 481, "If it be a record, conclusive between the parties, it cannot be denied; but by the plea of *null tiel* record," this language does not admit of the interpretation that a plea not denying the judgment, but which rests it upon the ground of a release, payment, or a presumption of payment, from the lapse of time, whether such presumption be raised by the common law prescription, or by a statute of limitation, may not be pleaded, any more, than where this court, in *Hampton v. McConnell*, 3 Wheaton, 234, says: "The judgment of a State court should have the same credit, validity, and effect, in every other court of the United States, which it had in the State court where it was pronounced; and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any court in the United States," is intended to exclude such defences as have just been stated, or such as inquire into the jurisdiction of the court in which the judgment was given, to pronounce it, or the right of the State itself to exercise authority over the persons or the subject matter. It has been well said, "The Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State." Story's Com. 183.

Such being the faith, credit and effect, to be given to a judgment of one State in another, by the Constitution and the act of Congress, the point under consideration will be determined by

settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy; and consequently that the *lex fori* must prevail. *Higgins v. Scott*, 2 Barn. & Adolph. 413; 4 Cowen, R. 528, note 10; *Id.* 530; *Van Ramsdyk v. Kane*, 1 Gallis. R. 371; *Le Roy v. Crowninshield*, 2 Mason, R. 351; *British Linen Com. v. Drummond*, 10 Barn. & Cresw. 903; *De La Vega v. Veanna*, 1 Barn. & Adolph. 284; *De Couche v. Savallier*, 3 Johns. Ch. R. 190; *Lincoln v. Battalle*, 6 Wend. R. 475; *Gulick v. Lodes*, Green's New Jersey Rep. 68; 3 Burge's Com. on Col. and For. Laws, 883. The statute of Georgia is, "that actions of debt on judgments obtained in courts, other than the courts of this State, must be brought within five years after the judgment obtained." It would be strange, if in the now well-understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our States, under our system, exercise this right in virtue of their sovereignty? or is it to be conceded to them in every other particular than that of barring the remedy upon judgments of other States by the lapse of time? The States use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not then limit the time for remedies upon the judgments of other States, and alter the common law by statute, fixing a less or larger time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other States shall be put upon a better footing, in regard to a State's right to legislate in this particular, than the judgment creditors of the State in which the judgment was obtained. And

if this right so exists, may it not be exercised by a State's restraining the remedy upon the judgment of another State, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years. In other words, may not the law of a State fix different times for barring the remedy in a suit upon a judgment of another State, and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred, that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments, is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred.

Counsel have relied, to establish a contrary doctrine, upon *Marlow v. Naylor*, Hill's South Carolina Rep. 439. But that case was obviously decided upon a misconception of the learned judges of the decision of this court in the case of *Mills v. Duryee*, 7 Cranch, 481.

It is, therefore, our opinion, that the statute of limitations of Georgia can be pleaded to an action in that State, founded upon a judgment rendered in the State of South Carolina.

The second question upon which the judges were divided in this case is, whether a judgment rendered in South Carolina, upon a promissory note, against the intestate when in life, should be paid in preference to simple contract debts. The law of Georgia provides that all debts of an equal degree shall be discharged in equal proportions as far as the assets of an intestate will extend: and that no preference shall be given amongst creditors in equal degree. Prince's Laws of Georgia, 152, sec. 8. And the order prescribed for the payment of debts of any testator, or intestate, by executors and administrators, is, "debts due by the deceased as executor, administrator, or guardian; funeral and other expenses of the last sickness; charges of probate and will, or of the



letters of administration; next, debts due to the public; next, judgments, mortgages, and executions, the eldest first; next, rent; then, bonds or other obligations; and, lastly, debts due on open account; but no preference whatever shall be given to creditors in equal degree, where there is deficiency in assets, except in cases of judgments, mortgages that shall be recorded, from the time of recording, and executions lodged in the sheriff's office, the eldest of which shall be first paid; or in those cases where a creditor may have a lien on any part of the estate." We first remark upon this question, that it was decided some years since (as is reported to us by the present district judge), in the Circuit Court of the United States for the district of Georgia, the question being, "whether judgments obtained in other States take precedence of simple contract debts," that in the administration of insolvent estates in Georgia such judgments take no precedence. Case of *Ten Eyck v. Ten Eyck*. We believe, from inquiry, for we have no published decision in point, from the courts of Georgia, that the judges of her superior courts hold the same opinion. In *Cameron v. Adm'rs of Wurtz*, 4 McCord's Rep. 278, it is decided, that in marshalling the assets of an insolvent estate, a judgment recovered in another State only ranks as a simple contract. The decision is correctly placed upon the footing that the first section of the fourth article of the Constitution has effected no change in the nature of a judgment. "It only provides, that as matter of evidence it shall be entitled to full faith and credit. But if the decisions in the cases of *Ten Eyck v. Ten Eyck*, and *Cameron v. Wurtz*, had not been as they are, and the point was now before us as an original question, we would come to the same conclusion. The Legislature of Georgia does not certainly, in terms, put judgments of other States, in the payment of decedent's debts, upon the footing of judgments of her own courts. The term judgments is used, and no preference can be given to creditors in equal degree. If, however, equality in the degree of judgment creditorship, is qualified by seniority; and if, of executions lodged in the sheriff's office, the eldest is to be the first satisfied; the law of Georgia gives the order in which judgments shall be paid. That order depends upon date, execution, and the execution having been lodged in the sheriff's office. In case of conflicts, then, between judgments or executions, it is to be decided by record evidence to be obtained from the courts in the State; and so far as a right of seniority can be given by the execution being lodged in

the sheriff's office, the judgment of another State can never have this privilege. It can have no right to an execution in Georgia; and any execution issued upon it, is in the State in which it was rendered. No one will contend that it could be placed with the sheriff, to be enforced, or to be put in competition with those issued upon domestic judgments. Here, then, is a case in which the judgment of another State would be excluded by the terms of the law, which, we think, indicates the intention of the Legislature not to place such a judgment upon the footing of domestic judgments in the administration of assets. But a more conclusive reason against any such extension occurs to us. By the law of Georgia all the property of the defendant is bound from the signing of the first judgment; all judgments obtained at the same term of the court bearing equal date, if they are entered and signed in the clerk's office at any time within four days after the adjournment of the court. Prince's Dig. 211. If, then, the judgment of another State is to be brought in upon the footing of a domestic judgment in the administration of the assets of testators and intestates, then this consequence may ensue; that a judgment of another State, having no lien upon property, may take preference, by the death of a defendant, over domestic judgments, having the first lien during his life; because the law says the eldest judgment must be first satisfied. Such a right, and exclusion of right, could never have been intended by the Legislature of Georgia to be conferred by the death of an individual. It is not necessary to pursue this inquiry further. We therefore think, in the payment of debts of a testator or intestate, in Georgia, that the judgment of another State, whatever may be the subject matter of the suit, cannot be put upon the footing of judgments rendered in that State, and that it can only rank for that purpose as a simple contract debt.

As to the wish intimated by counsel, in the conclusion of his reply, that this court would express its opinion, whether the statute, limiting the time within which suits are to be brought upon the judgments of another State, is in force, we cannot comply with it; as it is a question not comprehended in the division of opinion certified to this court.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Georgia, and on the points and questions on which the judges

of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such cases made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, first, that the statute of limitations of Georgia can be pleaded to an action in that State, founded upon a judgment rendered in the State of South Carolina: and, secondly, that in the administration of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note against the intestate when in life, should not be paid in preference to simple contract debts. Whereupon it is ordered and adjudged by this court, that it be so certified to the said Circuit Court.

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Article 4, sect. 7th of the Constitution of the United States declares, that "full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of every other State, and Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." This legislation was not new. The articles of Confederation contained a similar clause, and statutes of a like kind were enacted by the Colonial Legislatures before the Revolution, which do not seem to have received a judicial construction.

In pursuance of this authority, Congress, on the 24th of May, 1790, passed the following statute: "The acts of the Legislatures of the several States shall be authenticated by having the seal of the respective States affixed thereto. The records and judicial proceedings of the courts of each State, shall be proved or admitted in any other court of the United States, on the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, justice or presiding magistrate, as the case may be, that the said attestation is in due form; and the said records or judicial proceedings, so authenticated as aforesaid, shall have the same faith and credit given them in every court of the United States, as they have by law or usage in the courts of the State whence the said records are or shall be taken."

In order to understand these provisions, it is necessary to recur to the law as it stood before they were adopted. A foreign judgment has no direct or immediate obligation, and derives its force from the respect due by the tribunals of one sovereignty, to the adjudications of the courts of another. Aside from the Constitution of the United

States, the judgments of other States are in this regard foreign judgments. *Seevers v. Clement*, 28 Maryland, 426; *Folger v. The Columbian Insurance Company*, 99 Massachusetts, 267. It has long been a debated question, whether a judgment rendered by a foreign tribunal should be regarded as conclusive, or may be re-examined by the court in which it is made a defence or cause of action. The weight of authority has been, from an early period, that a person who brings a suit in which he is defeated, cannot pursue the defendant to another country, and revive the controversy there. Having chosen the forum, he is bound by the result, and the judgment may be pleaded in bar to an action for the same cause in another jurisdiction. Story on the Conflict of Laws, sect. 598; Savigny on Private International Law, 185, 193, note c.; *Phillips v. Hunter*, 2 H. Bl. 402; *Taylor v. Phelps*, 1 Gill, 492; *Griswold v. Pitcairn* 4 Connecticut, 85. But the English authorities at one time inclined to the opinion, which was also adopted on this side of the Atlantic, that when a suit was brought on a foreign judgment, the court might, and perhaps ought to inquire, whether the decision which they were asked to enforce was consonant with justice. The judgment was admitted to be *prima facie* evidence in favor of plaintiff, but did not preclude defendant from proving that the right lay with him. Or, as the rule is sometimes stated, a foreign judgment is conclusive as a defence, but only affords a presumption, when made the foundation of a suit. *Monroe v. Douglass*, 4 Sandford, Ch. 126, 181.

The soundness of this distinction is questionable. Practically, a debtor must be sued where he can be found, or has property liable to attachment, and if the creditor is precluded by the failure of the suit, a decision in his favor should be binding on the defendant. Accordingly, a foreign judgment rendered on due notice and by a competent tribunal, is now held by the English courts to be equally conclusive whether it is in favor of the plaintiff or defendant; 2 Smith's Leading Cases, 679, 841, 6 Am. ed.; *Doglioni v. Crispin*, 1 Law Reports, H. L. 301; *Brissac v. Rathbone*, 6 Hurlstone & Norman, 301; *Castrique v. Imrie*, 8 C. B., N. S. 415; and in *Lazalere v. Westcott*, 26 New York, 146; this view was adopted by the court of last resort in New York.

A different rule, however, prevailed during the last century, under which a party who had brought suit and recovered in one State or country, might be put to the risk and delay of trying the case over again if he sought to obtain satisfaction in another. It was to remedy this evil that the Constitution declared that the judgments of each State should have full faith and credit in every other; which, as interpreted by the act of May 16th, 1790, means such faith and credit as they ought to have in the courts of the State whence the record of the judgment comes. To render a judgment binding, the court must in general have jurisdiction of the parties and of the subject matter of the cause,

although there are cases where jurisdiction over the parties will confer jurisdiction over the subject matter, and others where jurisdiction over the subject matter is sufficient without jurisdiction over the parties.

Judicial proceedings may be either in *rem* or in *personam*. In the one case the object is to establish the existence of an obligation binding the defendant personally, and capable of being enforced against his property wherever situated; in the other, to bind the title to some specific thing. *Boswell's Lessee v. Otis*, 9 Howard, 348. In *Boswell's Lessee v. Otis*, McLean, J., said, "jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process, or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment, or a bill in chancery, it must be substantially a proceeding in *rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in *rem* in ordinary cases, but where such a procedure is authorized by statute on publication without personal service, it is of that character."

For the legitimate exercise of jurisdiction there must in general be either notice or appearance. *Gillett v. Camp*, 23 Missouri, 375; *Moulin v. The Insurance Company*, 4 Zabriskie, 222; 1 Smith's Leading Cases, 1913, 6 Am. ed. In the latter case the parties submit themselves to the authority of the court; in the former, the court acquires authority over the parties. *Lloyd v. Hicks*, 31 Georgia, 140. Appearance may be either personally or by attorney. Notice is such reasonable information that a suit has been brought as will enable the party to come forward and make defence. 1 Smith's Leading Cases, 1017, 6 Am. ed. A judgment rendered without notice or appearance is not in the due course of law, and will not impose a personal liability consistently with the constitutions of the States and of the Union. *Trimble v. Long*, 13 Ohio, N. S. 431, 439; *Borden v. Fitch*, 15 Johnson, 121. This is a fundamental principle which the provision that full faith and credit shall be given to the judgments of other States does not in anywise impair. *Calvin v. Reed*, 5 P. F. Smith, 375, 378; *Reed v. Elder*, 12 Id. 308. But the weight of authority would seem to be that a recital of record that the parties have appeared or been notified, is conclusive in the case of domestic judgment; *Cook v. Darling*, 18 Pick. 393; *Blood v. Crandell*, 2 Williams, 396; *Granger v. Clark*, 22 Maine, 128; *Baker v. Stonebraker*, 34 Missouri, 172; *Finneran v. Leonard*, 7 Allen, 54; although decisions may be found the other way. *Edwards v. Toomer*, 14 S. & M. 73; *Smith v. The State*, 13 Id. 140; 1 Smith's Leading Cases, 1021, 6 Am. ed.; *Goudy v. Hall*, 30 Illinois, 109. It is, however, always open to the defendant in an action on a foreign judg-

ment to show that he was not duly notified, and did not appear, because it will then be manifest that the proceedings were not in accordance with the natural law, which requires that every man shall have an opportunity of being heard in his own defence. *Rathbone v. Fry*, 1 Rhode Island, 73; *Moulin v. The Insurance Company*, 4 Zabriskie, 222, 243; 2 Smith's Leading Cases, 676, 842, 6 Am. ed.

In addition to jurisdiction over the parties, there must also be jurisdiction over the subject matter of the suit; although jurisdiction over the parties will ordinarily, where the demand is personal, confer the right to take cognizance of the cause. *Latourette v. Clarke*, 45 Barb. 327. An action of assumpsit may consequently, if the defendant is present and duly sworn, be maintained in New York or London, on a contract for the payment of money made or broken in India or Japan. The Federalist, No. 82. And this may be true even where the contract is for the conveyance of land or chattels lying beyond the reach or authority of the court, if it results in a pecuniary obligation or a demand for compensation in damages. *Mostyn v. Fabrigas*, 1 Cowper, 161; 1 Smith's Leading Cases, 954, 962; 3 Leading Cases in Equity, 3 Am. ed. 491. When, however, the suit is for the recovery of land, or even of personal property, the presence of the parties will not be sufficient to authorize a hearing and determination of the cause, if the subject matter is beyond the jurisdiction, and possession cannot be delivered in pursuance of the judgment. Story on the Conflict of Laws, sects. 522, 543; *Stacy v. Thrasher*, 6 Howard, 44; 1 Smith's Leading Cases, 961, 6 Am. ed.; *Paige v. McKee*, 3 Bush, 335. So far was this carried at common law, that a recovery could not be had in trespass or covenant for an injury affecting the ownership or enjoyment of real estate, unless the case could be submitted to a jury from the district where the land was situated. 1 Smith's Leading Cases, 6 Am. ed. 961.

A contract for the conveyance of or relating to land in another State may, however, sometimes be specifically enforced by a court of equity; 2 Leading Cases in Equity, 491, 3 Am. ed.; *Penn v. Lord Baltimore*, 1 Vesey, 744; but this power is more properly exerted where the land is in another part of the dominions of the same sovereign; and an English or American judge would hardly think himself entitled to decree a conveyance of land in France. Story on the Conflict of Laws, sect. 543, page 914.

In *McGregor v. McGregor*, 9 Iowa, 65, the court held, on the authority of *Massey v. Walls*, 6 Cranch, 148, that when the case involves a naked question of title, jurisdiction cannot be exercised out of the State where the land is situated, but that when the object of the suit is to enforce a trust arising *ex contractu*, or from any other source, the situation of the land will be immaterial, and a remedy may be

given by a decree *in personam* establishing the trust, or for a conveyance of the land in question, and that the jurisdiction arising under these circumstances will not fail because it is incidentally necessary to decide on title. See *Sturdevant v. Pike*, 1 Carter, 277; *Lewis v. Darling*, 16 Howard, 1. It is a necessary consequence that a decree of a competent tribunal in another State, establishing or disaffirming the existence of such a trust, will be conclusive on the courts of the State where the land is situated. *McGregor v. McGregor*.

It results from what has been said, that judgment will not ordinarily be pronounced unless the parties are present or have had an opportunity to be heard; 1 Smith's Leading Cases, 1013, 6 Am. ed.; but it is sometimes necessary to choose between proceeding in the absence of the defendant, and a denial of justice by an indefinite postponement of the cause, and a decree may then be made with reference to property within the jurisdiction of the court, without the service of process or actual notice to the person in whom the title is vested. The goods of an absconding or non-resident debtor may accordingly be seized and distributed among his creditors. An action may be brought for the recovery of land or chattels, notwithstanding the withdrawal of the person who is alleged to have taken or withheld them wrongfully from the owner. And it is every day's experience that the goods or credits of a defendant residing beyond the reach of process, may be attached as a means of satisfying the demands of the plaintiff. In every such instance, however, constructive notice in some form calculated to reach the party and put him on his guard, should be substituted for actual; and in default of this the proceeding will be contrary to natural justice and the fundamental principles of jurisprudence. The strict rule of the common law accordingly required, that property should not be attached as a means of satisfying a debt, unless the absence of the owner was verified by the sheriff's return to that effect; *Bruce v. Wait*, 1 Manning & Granger, 1; and although this precaution has been laid aside in this country as superfluous, the attachment will still be dissolved on proof, that the defendant was within the jurisdiction, and might have been served with process. 1 Smith's Leading Cases, 1016, 6 Am. ed.

These principles are common to all judgments, foreign or domestic; but there is this difference between the proceedings of a foreign and of a domestic tribunal, that while the record implies absolute verity in the latter case, and cannot be gainsaid even for the purpose of showing a want or usurpation of jurisdiction, it is so far open to contradiction in the former, that proof may be adduced that the court decided *ex parte* without summoning the parties, or that the proceeding was contrary in any other particular to the rule of public law. For as the obligation of a foreign judgment is derived from the international as distinguished from the municipal law, it must necessarily fail unless the proceedings

of the court were in accordance with the general principles of jurisprudence, as recognized by mankind at large. 2 Smith's Leading Cases, 842, 6 Am. ed.

It is now established in England that when the court had jurisdiction of the cause, and the parties were duly notified or summoned, a foreign judgment will be as conclusive on the merits as if it had been rendered by a domestic tribunal (ante, 2 Smith's Leading Cases, 679). If this rule had prevailed when the Constitution was adopted, it would have been less necessary to declare that the judgments of each State should have full faith and credit in every other. For, as we shall see hereafter, all that this declaration signifies, as judicially interpreted, is, that when a question has once been determined by a duly authorized tribunal in any part of the Union, it shall not again be drawn in controversy under an allegation that the judgment was founded on a mistake of fact or law. The jurisdiction of the court may be impugned, but if that existed and was duly exercised, the decision will be final on the merits. Thus limited, the rule is eminently wise and just, and would result from general principles, if not specifically declared.

The language of the Constitution might, however, at first sight, appear sufficiently broad to confer an extra territorial jurisdiction over persons residing beyond the State where the judgment was pronounced; and it was probably from an apprehension of the inconveniences that might result from such a doctrine, or the influence of preconceived ideas, that the State tribunals were at first disposed to fall into the opposite extreme of allowing the judgments of other States to be controverted on the merits, even when there was no doubt as to the authority of the court, or that the necessary steps had been taken to render it effectual.

In *Bartlett v. Knight*, 1 Mass. 401, and *Hitchcock v. Aickens*, 1 Caines, 460, the judgments of other States were put substantially on the same footing as foreign judgments, and it was held that although they were to be received as *prima facie* evidence on behalf of the party in whose favor they were pronounced, they were, notwithstanding, open to examination, and might be impeached collaterally on any ground that would have been available as a defence in the first instance. It was contended, in support of this construction, that the design of the Constitution was to regulate the proof and authentication of the records and judicial proceedings of other States, and not to render them conclusive when produced in evidence. A similar view was taken in *Taylor v. Bryden*, 8 Johnson, 173, and again in *Pawling v. Bird's Executors*, 13 Id. 192.

These decisions were manifestly at variance with the object which the framers of the Constitution had in view, as giving the judicial proceedings of the various States, which had become for all common pur-



poses one people, no greater faith or credit than those of foreign countries. The true rule was pointed out in *Armstrong v. Carson's Executors*, 2 Dallas, 302, by Wilson, Justice, who held that no exception could be taken to the judgment of another State that would not have been admissible in the jurisdiction where the judgment was pronounced. A plea of nil debet was consequently overruled without opposition from the defendant's counsel, who did not consider the question an open one. In *Mills v. Duryee*, 7 Cranch, 481, which was followed and confirmed in *Hampton v. Connell*, 3 Wheaton, 334, this interpretation received the sanction of the Supreme Court of the United States, and is now established both in the State and national tribunals. *Randolph v. Keiler*, 21 Missouri, 527; *Wernwag v. Pauling*, 5 Gill & Johnson, 500; *Reed v. Ross*, 1 Baldwin, 36; *Greeme v. Sarmiento*, 1 Peter's C. C. R. 74; *Spencer v. Brockway*, 1 Ohio, 259; *Goodrich v. Jenkins*, 6 Id. 43; *Evans v. Justine*, Ib. 117; 7 Id. 273; *Evans v. Tatem*, 9 S. & R. 252, 260; *Benton v. Burgot*, 10 Id. 240; *Hoxie v. Wright*, 2 Vermont, 269; *Starkweather v. Loomis*, Id. 573; *Blodget v. Jordan*, 6 Id. 580; *Fullerton v. Horton*, 11 Id. 425; *Boston India Rubber Factory v. Hart*, 14 Id. 92; *Newcomb v. Peck*, 17 Id. 302; *Burns v. Belknap*, 22 Id. 419; *Davis v. Connelly's Executors*, 4 B. Monroe, 136; *Hensly v. Fora*, 7 English, 756; *Buchanan v. Port*, 5 Indiana, 264; *McJilton v. Love*, 13 Illinois, 436; *Sharman v. Morton*, 31 Georgia, 34; *Butcher v. The Bank*, 2 Kansas, 701; *Crawford v. White*, 7 Iowa, 560; *McJilton v. Rowe*, 13 Illinois, 431; *Thompson v. Emmert*, 15 Id. 415; *Lawrence v. Jarvis*, 32 Id. 304; *Duvall v. Fearson*, 18 Maryland, 502; *Milne v. Van Buskirk*, 9 Id. 558; *Rocco v. Hackett*, 2 Bosworth, 579; *Pritchett v. Clark*, 5 Harrington, 631.

It is established under these decisions, that a judgment which is valid in the original forum, will be conclusive in every court to which a writ of error lies, directly or indirectly, from the Supreme Court of the United States. If the result is adverse to the defendant, he cannot contest the justice of the demand, in a suit brought beyond the State to enforce the judgment; if favorable, he will be finally discharged, not only in the State, but in every other. The rule is irrespective of the nature of the controversy, or the subject matter to which it relates; and a decree annulling the marriage contract, or declaring that the parties to it are not man and wife, cannot be impeached collaterally in another State, or even in that where the marriage was celebrated. *Church v. Wilson*, 9 Wallace, 108. And it will make no difference in the application of the principle, that the cause assigned for the divorce would have been dismissed under the *lex loci contractus* as inadequate or frivolous.

For like reasons a judgment for the plaintiff may be pleaded in bar to a suit upon the original cause of action, in the same or another

State. *Baxter v. Lynch*, 4 Harris, 241; *Child v. The Ureka Works*, 45 New Hampshire, 547; *The Bank of the United States v. The Merchants' Bank*, 7 Gill, 415; *The North Bank v. Brown*, 50 Maine, 214; *Cleeves v. Lord*, 42 Id. 290; *Ryland v. Eckert*, 11 Harris, 215; *Andrews v. Montgomery*, 19 Johnson R. 162. This may, with equal truth, be put on the ground of merger, or referred to the principle that a judgment that the defendant owes so much, is an adjudication that he is not indebted in a larger sum, which precludes the plaintiff from renewing his demand, or endeavoring to recover more than the amount of the judgment. 2 Smith's Leading Cases, 787, 6 Am. ed.

It will make no difference in the application of this principle, that the proceeding in which the judgment is set up as a bar, was instituted at an earlier date, than that in which the judgment was obtained; *The North Bank v. Brown*, 50 Maine, 214; nor that it was commenced by an attachment, under which the creditor obtained a lien, which will be lost if the plea is sustained. *The Bank of North America v. Wheeler*, 28 Connecticut, 433. This would seem, however, to result from a technical doctrine of the common law, and not from the rule laid down in the Constitution of the United States, which merely requires that the judgment shall be received as conclusive evidence of the debt and the amount due.

As the rule is established by the Constitution, so it is beyond the reach of State legislation. A statute enacting that "no action shall be maintained on any judgment or decree rendered by any court without this State, against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought therein," is unconstitutional and void, as assuming to prescribe a rule of evidence for another forum, and subversive of the faith and credit due to the judgment of a sister State. *Christmas v. Russell*, 5 Wallace's Reports, 290.

Extra territorially, however, the judgment is merely evidence of the highest grade. The remedy under it, and the order in which it shall be paid, depend upon the law of the forum where it is sought to be enforced, and if that provides that the action must be brought within six years, a suit instituted after the time prescribed, will fail (ante, 608.) *McElmoyle v. Cohen*, 13 Peters, 312.

Proceedings *in rem* are governed by the same principle, and the adjudication will be binding on the property in question, if it was within the jurisdiction when the proceedings were begun, and subject to the lien of the libel or attachment. *Cochran v. Fitch*, 1 Sanford's Ch. 146; *Hall v. Williams*, 6 Pick. 332; *Molyneux v. Seymour*, 30 Georgia, 440. "If," said Chief Justice Parker, in *Hall v. Williams*,

"the property of a citizen of another State, within our jurisdiction, is condemned by a lawful process, the decree is final and conclusive." Hence though no action in *personam* can be maintained on such a judgment, it will pass the title to the property attached, and be a good defence to any suit which the owner may subsequently bring to regain possession, or recover damages for the taking. *Cochran v. Fitch*. The law was so held by the Supreme Court of the United States, in *Green v. Van Buskirk*, 7 Wallace, 139, reversing the judgment of the Court of Appeals of New York; and an attachment issued in the State of Illinois, against a non-resident debtor, under which his chattels were seized and sold, held to be conclusive on a party claiming under a mortgage which, though prior in date, was not attended with possession as the law of Illinois required.

It is proper to add, that as the courts of the United States derive their authority from a government which is common to all the States, so their judgments are entitled to full faith and credit, irrespectively of the 4th Article of the Constitution, which only applies to the State tribunals. And the judgments of the courts of the District of Columbia are within the scope of this principle. *Hughes v. Davis*, 8 Maryland, 271.

The estoppel is not limited to the parties, but extends, as in other cases where judicial determinations are in question, to those who claim under them as privies by descent or purchase, or through construction or operation of law. 2 Smith's Leading Cases, 821, 6 Am. ed. Hence, a purchaser of real or personal property in one State, will be bound by a decree or judgment previously rendered in another, against the title of the person from whom he buys; *Marsh v. Pier*, 4 Rawle, 173; *Fletcher v. Farrell*, 9 Dana, 372; while a judgment for or against a man in his lifetime, will be equally conclusive against his executors and administrators after his death, whether they derive their authority from the State in which the judgment was rendered, or from a different source. An administrator is in privity with the intestate whom he represents. There is, however, no relation of privity between the personal representatives of an intestate, acting under an authority derived collaterally from different sovereignties, and they are, on the contrary, so far strangers to each other, that a judgment against an administrator commissioned by one State, will not be conclusive, or even *prima facie* evidence against an administrator acting under letters granted by another. *Taylor v. Barron*, 10 Foster, 78; 35 New Hampshire, 484; *Stacy v. Thrasher*, 6 Howard, 44; *McLean v. Meek*, 18 Id. 16; *Low v. Bartlett*, 8 Allen, 259; *Brodie v. Beckley*, 2 Rawle, 431. "An administrator," said Grier, J., in *Stacy v. Thrasher*, "acting under a grant of administration in one State, stands in none of these relations of privity to another administrator in another State. Each is privy

to the testator, and would be estopped by a judgment against him, but they have no privity with each other in law or estate. They receive their authority from different sovereignties, and over different property; the authority of each is paramount to the other. Each is administrator to the ordinary<sup>4</sup> from which he receives his commission; nor does the one come by succession to the other into the trust of the same property incumbered by the same debts, as in the case of an administrator *de bonis non* who may truly be said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties."

It was said, in like manner, in *Taylor v. Barron*, 35 New Hampshire, 484, that there is no legal privity between administrators appointed in different States. The Constitution had not changed the well settled doctrine, that a judgment rendered in one State, for or against an administrator, is, *res inter alios*, as it regards an administrator deriving his powers from another jurisdiction. A creditor whose claim had been rejected by a Court of Probate in Vermont, might, consequently, be entitled to prove it in New Hampshire, and obtain satisfaction out of the assets there.

The rule holds good, even when the administrator is the same person in both jurisdictions, because he is sued in his fiduciary or representative, and not in his personal capacity; and although he may have been named as executor, if he acts by virtue of an authority derived through the law, and not under that conferred by the testator. *Aspden v. Nixon*, 4 Howard, 469. A judgment against one executor is, notwithstanding, *prima facie*, though not conclusive evidence, against another acting under the same will, or by virtue of letters testamentary granted by a foreign country; *Hill v. Tucker*, 13 Howard, 458; because the powers of an executor have their source in the will, and not in the grant of letters testamentary. *Heydenfeldt v. Towers*, 27 Alabama, 432. And in *Latine v. Clements*, 3 Georgia, 426, a judgment against an executor was held to be admissible, in a suit brought for the same cause against the defendant, who had taken out administration with the will annexed.

The point determined in *Mills v. Duryee*, was, that *nil debet* is not a good plea in an action on a judgment of another State. The case has been variously interpreted, but all that it necessarily implies or establishes is, that such an adjudication cannot be controverted on the merits. Mr. Justice Johnson, who dissented from the judgment of the court, seems to have thought that the effect of the decision would be to limit the defence in actions of this description, to a plea of *nul tiel record*, and that, if the record when produced, disclosed the existence of such a judgment as the plaintiff had alleged, the court would be compelled to decide in his favor. This is, however, a narrower view

than the language of the Constitution warrants, or the decision of the majority of the court requires. For although it is no doubt true, as Story, Justice, following the act of Congress, intimated, that a judgment should have the same effect throughout the Union, as in the State where it was rendered, still, this does not imply that the design of the Constitution was to make void judgments valid, but that those which have the necessary requisites, should be as conclusive everywhere as in the State where they were originally pronounced. In other words, it is the effect which a judgment ought to have, and not merely that attributed to it by the laws of the State, which must be considered in determining the faith and credit due to it under the Constitution of the United States. *Steel v. Smith*, 7 Watts & S. 447 (post). There is, consequently, nothing in the case of *Mills v. Duryee*, to justify the idea that a suit commenced by the attachment of a cask of wine, or other specific property, without notifying the defendant, would bind property not attached, and still less that it would impose a personal obligation. *Boswell's Lessee v. Otis*, 9 Howard, 348; *Jones v. Spencer*, 15 Wisconsin, 583. On the contrary, a State law which should profess to render a judgment conclusive on persons who were not subject to the authority of the court, would, for extra territorial purposes at least, be merely void, even if the tribunals of the State were so ill advised as to pronounce it valid. *Steele v. Smith*, 7 W. & S. 447. The Legislature of one State, has no direct authority over the citizens of another State, and cannot exercise it indirectly through the courts. *Hall v. Williams*, 6 Pick. 222. It was held, as far back as the case of *The Marshalsea*, 10 Coke, 68, that no adjudication can be valid unless the court has jurisdiction of the cause and the parties; *Folger v. The Columbian Insurance Company*, 99 Mass. 267; and the principle applies with full force, when the judgments of one sovereignty, are pleaded or given in evidence in another. *Price v. Hickok*, 39 Vermont, 292; *Page v. McKee*, 3 Bush, 135; *Lawrence v. Jarvis*, 32 Illinois, 304. There may be a record, under such circumstances, but it is the record of a nullity without legal force. *The Penobscot v. Weeks*, 52 Maine, 456; *Bruce v. Cloutman*, 45 N. H. 37; *Fell v. Darden*, 17 Louisiana, 236; *Ewers v. Coffin*, 1 Cushing, 23; *The Commonwealth v. Blood*, 97 Mass. 348. In determining this question, the court should examine the record, and refuse to enforce the judgment, if what is set forth shows with the aid of the light to be derived from other sources, that the writ was not duly served, or that there was an excess of authority in any other material particular. *Ewer v. Coffin*; *The Commonwealth v. Blood*, 97 Mass. 338; *Rape v. Heaton*, 9 Wisconsin, 328; *Smith v. Steel*, 7 W. & S. 447.

This is equally true, whether the question arises on a domestic judgment, or under the Constitution of the Union in an action brought on the judgment of another State. *Folger v. The Columbian Ins. Co.*, 99

Mass. 267; *Steel v. Smith*, 4 W. & S. 447; *Moulin v. Trenton Ins. Co.* 4 Zabriskie, 222, 242; *Clarke v. Bryan*, 11 Maryland, 176; *Harris v. Haldeman*, 14 Howard, 340; *Darcy v. Ketchum*, 11 Id. 165; *Evans v. Justin*, 7 Ohio, 273; *Helton v. Plattner*, 13 Id. 209; *Thompson v. Emmett*, 15 Illinois, 415; *Lawrence v. Jarvis*, 32 Ill. 304. A judgment purporting to determine or transfer the title to land situated beyond the limits of the State, will consequently be invalid, even when the court has acquired jurisdiction over the parties by the service of process. *Page v. McKee*, 3 Bush, 333 (ante, 614).

These principles were established in *Bissell v. Briggs*, 9 Mass 462, which preceded the case of *Mills v. Duryee*, by several years, and gave an interpretation to the Constitution which the subsequent course of decision has confirmed. The judgment was delivered by Chief Justice Parsons, in the following terms: "To entitle a judgment rendered in any court of the United States to the full faith and credit mentioned in the Federal Constitution, the court must have had jurisdiction, not only of the cause, but of the parties. To illustrate this position, it may be remarked, that a debtor living in Massachusetts; may have goods, effects, or credits, in New Hampshire, where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that State, in the hands of the bailiff, factor, trustee, or garnishee of his debtor, and on recovering judgment, those goods, effects, and credits, may lawfully be applied to satisfy the judgment; and the bailiff, factor, trustee, or garnishee, if sued in this State, for those goods, effects, or credits, shall, in our courts, be protected by that judgment, the court of New Hampshire having jurisdiction of the cause, for the purpose of rendering that judgment; and the bailiff, factor, trustee, or garnishee, producing it, not to obtain execution of it here, but for his own justification. If, however, those goods, effects and credits, are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment in this State, to obtain satisfaction, he must fail, because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment. And if the defendant, after the service of the process of the foreign attachment, should either in person have gone into the State of New Hampshire, or constituted an attorney to defend the suit, so as to protect his goods, effects, or credits, from the effect of the attachment, he would not thereby have given the court jurisdiction of his person, since this jurisdiction must result from the service of the foreign attachment. It would be unreasonable to oblige any man living in one State, and having effects in another State, to make himself amenable to the courts of the last State, that he might defend his property there attached.

"From this reasoning, the conclusion is manifest, that judgments rendered in any other of the United States, are not, when produced

here as the foundation of actions, to be considered as foreign judgments, the merits of which are to be inquired into, as well as the jurisdiction of the courts rendering them. Neither are they to be considered as domestic judgments, rendered in our own courts of record, because the jurisdiction of the courts rendering them is a subject of inquiry. But such judgments, so far as the courts rendering them had jurisdiction, are to have, in our courts, full faith and credit. They may, therefore, be declared on as evidence of debts or promises; and, on the general issue, the jurisdiction of the courts rendering them, is put in issue, but not the merits of the judgments.

"When we look into the case before us, we find that the judgment on which the present action was brought, was rendered in a court of record, in the State of New Hampshire, against defendants, who are named in the writ, as of Boston, in this commonwealth; and it is agreed, that when the writ was issued and served, they were in the State of New Hampshire; and that the original process was served on them personally. It appears, from the record, and is agreed, that they appeared to the writ, and defended the action, and were thus parties to the judgment. Now, an inhabitant of one State may, without changing his domicile, go into another; he may there contract a debt, or commit a tort, and while there, he owes a temporary allegiance to that State, is bound by its laws, and is amenable to its courts. The defendant, Briggs, must, therefore, be considered as a party to a judgment rendered against him by a court which had jurisdiction of the cause and of the parties to it. He cannot, therefore, in my opinion, be admitted by evidence, to impeach that judgment, or to deny it, or in any manner to derogate from the full faith and credit to which it is entitled."

Sewell, J., dissented from the opinion of the court for reasons analogous to those given by Mr. Justice Johnson in *Mills v. Duryee*, and which may be summed up as follows: It was necessary to take one of two views. If the judgments of other States were to be regarded in the same light as domestic judgments, they could not, when within the general powers of the court, be impeached collaterally on the ground that those powers had not been regularly exercised, and the only remedy would lie in a writ of error or an application to the tribunal which pronounced the judgment. Every intendment was to be made in favor of the proceedings of a superior tribunal, and jurisdiction should be presumed unless the contrary appeared. It was not pretended that the defendant in an action of debt brought in Massachusetts, on a judgment of that State, could introduce evidence that he was not notified, or that he had not appeared. This could not be done even if the record was silent, and certainly not if it contained a recital or averment of notice. If the judgments of the courts of other States

were open to contradiction in these particulars, they were governed by a different and less rigid rule than that prevailing in the case of domestic judgments, and the investigation ought to be carried far enough to do justice between the parties.

There is undoubtedly much seeming force in the argument that if judicial proceedings are to have the same effect throughout the Union as in the State where they take place, a denial of notice or appearance must be as inadmissible as a plea going to the merits of the action. But the objection is technical rather than sound. The record of a domestic judgment cannot be impeached by proof that the recitals which it contains are false; but this is because the municipal law gives the injured party a remedy through an application to the court to set the judgment aside, or a suit against the officer who made the return or entry. In other words, the judgment is sustained, not because it is good, but by force of a presumption of so high a nature that it cannot be gainsaid. When, however, such an adjudication is made the basis of a suit in another State, other considerations arise, and the rule varies accordingly. It would obviously be inequitable, under these circumstances, to enforce the judgment and send the defendant for redress to a remote jurisdiction; and the only course that can be taken consistently with justice, is to permit him to show that the judgment is *ex parte* and void. The laws of a country do not operate extra territorially, and a judgment against a resident of another State is a mere nullity, unless he submits to the authority of the court by coming within the reach of process or appearing. And the Constitution may reasonably be supposed to have reference to judgments which are valid, and not to such as are void. "The judgment of another State is put by that instrument on the same footing as a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it, or the right of the State itself to exercise authority over the persons or the subject matter. The Constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory." Story's Com. on Constitution, sect. 183. This distinction was recognized as sound in the case of *McElmoyle v. Cohen* (ante, 606).

The principle was applied in *Hall v. Williams*, 6 Pickering, 222, which was an action of debt brought on a judgment obtained in the State of Georgia. The defendants pleaded that neither of them was served with process or appeared personally or by attorney in the original action; and that Fiske, one of the defendants, never was an inhabitant or resident of Georgia; was not served with process, and never appeared in the action. The plaintiff, in reply, relied on a recital in the record that the defendants had appeared, as an estoppel precluding



such a defence. The entries in the suit, however, showed that one only of the defendants had been served with process, and that the plea was filed on his behalf. Under these circumstances the court held that the allegation that both the defendants were in court, might have been conclusive, if sustained by the rest of the record, but that as it was not, there was estoppel against estoppel, which set the matter at large and left the party free to show the truth. The judgment was, therefore, clearly null as it regarded him, and if binding on the other defendant, still could not be made the foundation of a suit in which both were charged.

It was said, in like manner, in *Christmas v. Russell*, 5 Wallace, 305, that "the judgments of other States, are not, strictly speaking, either foreign or domestic judgments."

"They certainly are not foreign judgments, under the Constitution, and the laws of Congress, in any proper sense, because they 'shall have such faith and credit given to them in every other court within the United States, as they have by law or usage, in the courts of the State from whence they were taken;' nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court, and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments."

It is, accordingly, established, that jurisdiction cannot be acquired or exercised over persons who are not domiciled within the State or subject to its laws, without actual service, or an appearance in person or through a duly constituted attorney. *Smith v. Smith*, 17 Illinois, 482; *Pollard v. Wegerer*, 13 Wisconsin, 569; *Pierce v. Hickok*, 39 Vermont, 292.

A suit commenced by the attachment of goods or land, cannot found a personal liability or even bind property not attached. *Woodward v. Tremere*, 6 Pick. 354; *Enos v. Coffin*, 1 Cushing, 23; *Gillett v. Camp*, 23 Missouri, 375; *Jones v. Spencer*, 15 Wisconsin, 583. It will make no difference that the writ is published and sent to the residence of the defendant, by a messenger or through the post office. Knowledge is not equivalent to notice, and a court cannot acquire jurisdiction, by directing service to be made beyond the limits of the State, and within those of another sovereignty. *Enos v. Coffin*; *Woodward v. Tremere*; *Pierce v. Hickok*. In the language of the Supreme Court of Alabama, in *Foster v. Glazener*, 27 Alabama, 396, "it is a well settled principle of international law, that every attempt on the part of one nation or State, by its legislation, to grant jurisdiction to its courts over persons or property not within its territory, is

regarded elsewhere as mere usurpation, and all judicial proceedings in virtue of it, are held utterly void for every purpose."

It is equally clear, although dicta may be found to the contrary, that service on an agent, even when coupled with an attachment of the property of the principal, is not a sufficient foundation for a judgment charging the latter personally, at all events when his domicile is in another State, and he does not owe obedience to the law by virtue of which the judgment is pronounced. And it is generally conceded, that if it appears expressly, or by a necessary intendment, that the writ was not duly served, and there is no allegation of appearance, the judgment will not be a good cause of action in another State. *Rape v. Heaton*, 9 Wisconsin, 329; *Pollard v. Wegener*, 13 Id. 569; *Smith v. Smith*, 17 Illinois, 482; *Smith v. Steel*, 7 W. & S. 447 (post); *Latimer v. The Railway*, 43 Missouri, 108. Accordingly, where the president of an insurance company chartered by the State of New Jersey, was served with process while passing through the State of New York, the court held that jurisdiction was not thereby obtained over the corporation, and that a judgment subsequently taken against them by default was void, and could not be made the foundation of a recovery in New Jersey. *Moulin v. Insurance Company*, 4 Zabriskie, 222. But it was admitted that the judgment might have been valid if the defendants had opened an office, or transacted business in the State where the service took place. It was decided in like manner, in *Latimer v. The Union Pacific Railway*, 43 Missouri, 105, that jurisdiction could not be acquired over a foreign corporation, by a service on the president or secretary while passing through or temporarily residing in the State. Such a judgment might bind assets subject to the jurisdiction of the court, but could have no extra-territorial operation. See *Hurlburt v. The Hope Insurance Company*, 4 Howard, New York, 275, 415; *Brewster v. The Railroad*, 5 Id. 83.

The subject was fully considered in *Rothbone v. Fry*, 1 R. I. 73. and *Rape v. Heaton*, 9 Wis. 329, which establish that to render a judgment in one State valid in another, notice must have been given to the defendant, in conformity with some rule or statute, binding on him at the time when the writ was served, and must moreover be set forth with such convenient certainty on the record as to show that the service was effectual. This was said to be true, even when the party was domiciled in the State at the time and subject to its laws, which would, in the absence of proof to the contrary, be presumed to require that the party should have such reasonable information of the institution of the suit as would enable him to appear and take defence.

The doctrine that jurisdiction cannot be acquired without an appearance or a notice, placing the party under a legal obligation to appear, is equally applicable whether the plaintiff or defendant is in

question, and an action founded on a judgment rendered in favor of a defendant for costs, may be resisted by proof that the attorney who brought the original suit was not authorized or retained by the plaintiff; *Gleason v. Dodd*, 4 Metcalf, 333; *Watson v. New England Bank*, Ib. 343; and the same objection might no doubt be made if a judgment in favor of the defendant, were pleaded in bar to an action for the same cause in another State.

In *Darcy v. Ketchum*, 11 Howard, 165, the defendant was sued in Louisiana, on a judgment rendered against him in the State of New York, jointly with one George Gossitt and certain other persons. The record of the original proceedings contained no entry of service on any of the defendants, and Gossitt was the only one who had appeared. Under these circumstances the want of jurisdiction was held to be manifest on inspection, and capable of being taken advantage of without proof. It was conceded that the judgment was so far valid under the laws of New York, that it might be enforced against property held or acquired by the defendants jointly, although it was not personally binding on those who did not appear. But the argument drawn from this source and the provisions of the act of 1790, that judgments shall have the same effect everywhere as the State where they were pronounced, was met by the reply that in construing the act, regard must be had to the evil which it was designed to correct. This was the refusal of the State courts to view the judgments of other States as more than *prima facie* evidence, even when rendered after personal service or appearance. Congress did not intend in remedying this evil to introduce another, by enabling the State tribunals to exercise jurisdiction over the citizens of other States, who were not duly notified and did not appear. Judgments rendered in accordance with the doctrines of international law and natural justice, which require that a man shall not be condemned without being heard were within the statute, but it had no application to those which were inherently defective or void.

This case was to a great extent based on that of *Smith v. Steele*, 7 W. & S. 447, where it had been held the judgments of other States must be tested by the principles of international law, rather than by the usages or statutes of the place where they were rendered, and that their conformity to the one, will not render them binding if they are invalid under the well settled rules and principles of the other. "The power delegated by the Constitution, to Congress," said Gibson, C. J., in delivering the opinion of the court, "has been executed by a provision, that the judicial records of a State when proved in the manner prescribed, shall have such faith and credit given them as they have by law or usage in the courts of the State from whence the said records are or shall be taken; and if it were not open to these defendants to inquire into the legality of the jurisdiction assumed over their persons,

they would certainly be concluded. The record shows that there was service on one of the joint owners, which in the estimation of the law of the forum was service on all; for it is affirmed in *Hill v. Bowman*, already quoted, that the State of Louisiana holds all persons amenable to the process of her courts, whether citizens or aliens, and whether present or absent. It was ruled in *George v. Fitzgerald*, 12 Louisiana R. 604, that a defendant, though he reside in another State having neither domicile, interest, nor agent in Louisiana, and having never been within its territorial limits, may yet be sued in its courts by the instrumentality of a curator appointed by the court to represent and defend him. All this is clear enough as well as that there was in this instance a general appearance by attorney, and a judgment against all the defendants, which would have full faith and credit given to it in the courts of the State. But that a judgment is always regular when there has been an appearance by attorney with or without warrant, and that it cannot be impeached collaterally for anything but fraud or collusion, is a municipal principle, and not an international one, having place in a question of State jurisdiction or sovereignty. Now, though the courts of Louisiana would enforce this judgment against the persons of the defendants if found within reach of their process, yet, where there is an attempt to enforce it by the process of another State, it behooves the court whose assistance is invoked to look narrowly into the constitutional injunction and give the statute to carry it out a reasonable interpretation. Though we have no decision of the Supreme Court of the United States, we have the authority of Mr. Justice Story (Com. on Const. § 1307), for saying that, though such a proceeding is put, in general terms, on the footing of a domestic judgment, it is open to inquiry into the jurisdiction of the court to pronounce it, as well as into the right of the State itself to exercise authority over the persons or the subject matter, for which he refers to *Bissel v. Briggs*, 9 Mass. 462; *Shumway v. Stillman*, 4 Cowen, 292; and *Borden v. Fitch*, 13 Johns. 121; to which might be added as of equal authority our own decision in *Benton v. Burgot*, 10 Serg. & Rawle, 240. What then, is the right of a State to exercise authority over the persons of those who belong to another jurisdiction and who have, perhaps, not been out of the boundaries of it? 'The sovereignty united to domain,' says Vattel, 'establishes the jurisdiction of the nation over its territories or the countries which belong to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, or the country which belongs to it; to take cognizance of the crimes committed and the differences that arise in the country.' 'On the other hand,' adds Mr. Justice Story (Conf. ch. 14, § 539), no 'sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these

limits is a mere nullity, and incapable of binding such persons or property in other tribunals.' And for this he cites *Picquet v. Swan*, 5 Mason, R. 35-43. Not to multiply authorities on a point so plain, it will be sufficient to add the name of Mr. Burge, (1 Conf. 1), who says: 'it is a fundamental principle, essential to the sovereignty of every independant State, that no municipal law, whatever its nature or object, should *proprio vigore*, extend the territory of the State by which it has been established.' And again (3 Burge, Conf. 1044), 'that the authority of every judicial tribunal, and the obligation to obey it, are circumscribed by the limits of the territory in which it is established.' Such is the familiar, reasonable, and just principle of the law of nations, and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the Revolution. Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction, which would confound all distinctive principles of separate sovereignty; and there evidently was such an assumption in the proceedings under consideration. The court did not, indeed, begin by appointing a curator to represent the absentees, of whose defence he would probably have been ignorant or careless; but they did as bad, by assuming that the joint owner present was the partner and attorney of his fellows absent—an assumption unfounded in fact or the law of any other community. A judgment following such a beginning, carries with it no presumption of justice. But I would, perhaps, do the jurisprudence of Louisiana injustice, did I treat its cognizance of the defendants as an act of usurpation. It makes no claim to extra-territorial authority, but merely concludes the party in its own courts, and leaves the rest to the Constitution, as carried out by the act of Congress. When, however, a creditor asks us to give to such a judgment, what is in truth an extra-territorial effect, he asks us to do what we will not, till we are compelled by a mandate of the court in the last resort. To give the same effect to a criminal law, would not be a greater invasion of State rights; and it will scarce be asserted, that a State would be bound to deliver up one of its inhabitants as a fugitive from justice, to answer for an act done within his own State. Yet the constitutional provision embraces all proceedings, whether criminal or civil. It seems, then, that it was not intended to efface the lines of territorial jurisdiction for the origination of process, but only to give extra-territorial effect to judgments of tribunals having jurisdiction of the persons or the property in the first instance; and we must, consequently treat all others as nullities."

It results from these decisions that an agreement cannot be annulled or enforced by a judicial sentence, unless both the parties are subject to the authority of the tribunal by which the decision is pronounced.

The court will not proceed at the instance of the complainant, unless the defendant is also present, or has an opportunity of being heard. No one would pretend that a decree directing a bond to be given up or cancelled was valid against an absent obligor who was not summoned. If, however, we are to believe the case of *Cheever v. Wilson*, 9 Wallace, 108, the marriage contract is an exception to this rule, and may be dissolved on the application of either party although the other is not summoned, does not appear, and resides beyond the jurisdiction of the court. This decision may be law by virtue of the authority of the Supreme Court, but it is opposed to the best considered cases in the State tribunals; *Colvin v. Reed*, 5 P. F. Smith, 375; *Reel v. Elder*, 12 Id. 308; *Borden v. Fitch*, 15 Johnson, 141; *The Commonwealth v. Blood*, 97 Massachusetts, 348; and obviously tends to results which were not designed or contemplated when the Constitution was adopted. It may be that the departure of one of the parties to the matrimonial compact from the common domicile, will not preclude the other from procuring a divorce under the local law. The jurisdiction is derived from a joint act which one cannot undo. But it does not follow that a husband can by going to another State or country enable the courts to pronounce a decree that will be binding on the wife without service of process or appearance. Under these circumstances, she does not submit herself to the authority of the court by coming within the jurisdiction, nor does the court acquire authority over her, and there is consequently nothing on which jurisdiction can rightfully be based.

The principle is the same when there is a want of jurisdiction over the cause. In *Folger v. The Columbian Insurance Company*, 99 Massachusetts, 267, the suit was brought in Massachusetts against a corporation chartered by the State of New York. It appeared from the case stated that a decree of dissolution had been pronounced against the corporation by the Supreme Court of the latter State, on a petition filed by a stock holder, setting forth that the directors were declaring and paying dividends out of the capital stock, contrary to the provisions of the charter. It was contended, on behalf of the defendant, that the courts of New York were the appropriate forum for the adjudication of questions arising under her laws, and that their decision could not be overruled collaterally by a foreign tribunal. The court were, however, of opinion that the decree was void for want of jurisdiction. In delivering judgment, Gray, J., observed, that the article of the Constitution of the United States, which requires full faith and credit to be given in each State to the judicial proceedings of every other State, did not preclude the inquiry whether a judgment obtained in one State, and relied on in another, was rendered by a court having jurisdiction of the cause, and of the parties. *Hickey v. Stewart*, 3 Howard, 762; *Darcy v. Ketchum*, 11 Id. 165; *Carleton v. Bickford*, 13 Gray, 591.

If the court was one of general jurisdiction, the presumption, indeed, was in favor of the validity of its proceedings. *Harvey v. Tyler*, 2 Wallace, 328; *Knapp v. Abell*, 10 Allen, 485. But this presumption was not conclusive, and it was always competent to show that the court had not jurisdiction of the cause. If it had not, there was no judicial proceeding, as in the case of an appeal of death brought in the English common bench, which was *coram non jure*, *Case of the Marshalsea*, 10 Co. 766. This was peculiarly true when the action of the court was not in the exercise of its inherent general jurisdiction, but under a special power conferred by statute, and the judgment if in excess of the authority, would be void. *Thatcher v. Powell*, 6 Wheat. 125; *Shriver v. Lynn*, 2 Howard, 60.

In the case under consideration, the Court of Appeals had assumed to dissolve a corporation at the suit of a private individual. No such power was known to the common law, nor had it been exercised at any time by equity. *The Boston Glass Company v. Langdon*, 24 Pick, 52. The revised statutes were relied on, but did not warrant the decree. They only authorized the dissolution of a corporation on the application of the directors, or where it had been insolvent for more than a year. The record, as produced in evidence, did not present either of these features, and as the proceedings were under a special statutory power the defect could not be aided by presuming that which did not appear.

What the record must contain in order to make the judgment valid, and whether jurisdiction should be presumed when the facts necessary to confer it do not appear on the face of the proceedings, are, however, difficult and disputed questions, about which the authorities do not agree. *Wilcox v. Kassick*, 2 Michigan, 165; *Wilson v. Jackson*, 10 Missouri, 196. In *Rape v. Heaton*, 9 Wisconsin, 328, a judgment by default in Pennsylvania, was held insufficient as a ground of recovery in Wisconsin, because the return of the sheriff to the writ, as set forth of record, did not show which of the defendants was served, or that the person with whom the copy of the writ was left was of full age. The defendants bore the same surname, and might have been members of the same household, but the court said that this could not be inferred from the return, which was, "served by leaving a copy of the writ with a member of his family." It was held to be immaterial that the defendants were domiciled in Pennsylvania, because it must be presumed, in the absence of proof, that the law was the same there as in Wisconsin, and required a personal service, or that a written notice should be left with an adult member of the family. A similar decision was made in *Hall v. Williams*, 6 Pick., where it appeared from the record that only one of the defendants were served or pleaded. In these instances, the parties filed a plea denying notice or appearance, but the result would

apparently have been the same if the question had arisen on a plea of *nul tiel record*.

It has also been said, in some instances, that to render the judgment of another State a good cause of action, the record must show that the court took the necessary steps to obtain jurisdiction over the parties. *Rangely v. Webster*, 11 New Hampshire, 299; *Burringer v. King*, 5 Gray, 11; *The Commonwealth v. Blood*, 97 Mass. 338, 340. This, it was held in *Rangely v. Webster*,<sup>\*</sup> that notice was a fact which should appear affirmatively, and could not be presumed, if it was not averred. The weight of authority, however is, that if the presumption *omnia rite acta* is not irrefragable, where the proceedings of superior tribunals are in question, it will at least stand until overthrown by proof. 1 Smith's Leading Cases, 1021, 6 Am. ed.; *Wheeler v. Raymond*, 8 Cowen, 311; *Jarvis v. Robinson*, 21 Wisconsin, 523; *Moore v. Starks*, 1 Ohio, N. S. 369; *Richards v. Skiff*, 8 Id. 586. The better opinion, therefore, seems to be, that although the failure of the record to show notice, will leave the way open for an allegation that it was not given, it will not authorize a judgment for the defendant, on a plea of *nul tiel record*, or a demurrer to the declaration. *Wood v. Watkinson*, 17 Connecticut, 306; *Hall v. Williams*; *Butcher v. The Bank*, 2 Kansas, 70; *McJilton v. Love*, 13 Illinois, 486. A court sitting publicly for the administration of justice, will be presumed to have exercised their authority duly, until the contrary is proved, and the burden is upon him who alleges that they did not proceed with notice to the parties and in the due course of law. *Butcher v. The Bank*; *Thompson v. Emmert*, 15 Illinois, 115; *Dunbar v. Hollowell*, 34 Id. 168. Accordingly, when the record sets forth that the writ was served, it will be presumed to have been served according to law, and in a way to sustain the judgment. *Wilson v. Wilson*, 10 Missouri, 334. And for a like reason, it is not necessary for the record to show that the defendant was notified that a judgment of non-suit which had been entered for the plaintiff had been set aside, and that the latter was about to proceed to trial, because the presumption is that the court would not adopt such a course in a way to prejudice the defendant. *Sanford v. Sanford*, 28 Connecticut, 6. This case, said Storrs, C. J., in delivering judgment, "is governed by the familiar maxim, applicable to the proceedings of every court having jurisdiction of a case, *omnia presumuntur solemniter esse acta*, under which it is presumed that the decisions of such a court are well founded, and its judgments regular, and that facts without proof of which its judgments should not have been rendered, were proved before it. *Littleton v. Cross*, 3 B. & C. 327; *Spieres v. Parker*, 1 T. R. 145; *The King v. Lyme*, 1 Doug. 159; *The King v. Nottingham Water Works Company*, 6 A. & E. 355; Broom's Legal Maxims, 427. In *Moore v. Starks* (1 Ohio St. Rep.



369), it was held that the judgment of a court of general jurisdiction, in a case in which it expressly appeared from the record, that no service of the process was made upon the defendant, was a nullity, but that if the record had been silent on the subject of such service, the judgment would have been valid, and could not be collaterally impeached. The court says, "If the court obtained jurisdiction over the person of the defendant, it matters not what errors may have intervened, their proceedings cannot be collaterally impeached, but must be held valid until reversed. If, however, that jurisdiction was not obtained, the record is a nullity. This case differs from cases in which the record is silent on the subject of process or service. In such cases it has been held, that although the decree of the court is reversible for error, as not showing affirmatively a necessary fact, yet because a court of general jurisdiction, has assumed to exercise jurisdiction of the case, it will be presumed that, notwithstanding the silence of the record, the court had obtained jurisdiction over the person of the defendant. These principles are confirmed in *Richards v. Skiff* (8 Ohio St. Rep. 586), and seem to us to be elementary."

The attorneys by whom the parties are represented are within the benefit of this rule as being officers of the court, and those who deny their authority to act must show that they were not duly authorized. *Thompson v. Emmert*, 15 Ill. 415; *Lawrence v. Jarvis*, 32 Id. 304; *Wilson v. Kassick*, 2 Mich. 165, 177; *Potter v. Parsons*, 14 Iowa, 286. Hence it will not be a good objection to an exemplification of the judgment of another State that it does not show a warrant filed by the attorney who instituted the suit or appeared and took defence. *Rogers v. Burns*, 3 Casey, 525. Such an omission may be erroneous; *Banning v. Taylor*, 12 Harris 297; but it does not render the judgment void, and it is not therefore a defence to an action brought collaterally on the judgment.

The presumption in favor of superior courts does not prevail in the case of inferior courts, or of any court acting under a limited and statutory power, and not in the course of common law. 1 Smith's Ldg. Cases, 991, 1011; *Stricker v. Kelly*, 7 Hill, 116; *Folger v. The Ins. Co.* 99, Mass. 267; *Easton v. Badger*, 33 New Hamp. 228. To render the judgment of a justice of the peace or other inferior tribunal binding in another State, the record must consequently set forth enough to show that jurisdiction was acquired over the cause and the parties. *Thomas v. Robinson*, 3 Wend. 267; *Sheldon v. Hopkins*, 7 Id. 345; *Archer v. Romaine*, 14 Wis. 375; and in *Folger v. The Ins. Co.*, the rule was applied to a decree of the superior court of New York, dissolving a corporation chartered by the Legislature of that State under a power conferred specially by statute. It was said in like manner in *The Commonwealth v. Gould*, 97 Mass. 538, that as the

power to divorce *a vinculo* was not known to or given by the common law, the record must show affirmatively that the parties resided within the State, and were duly notified; and if it did not, the decree would be void, and could not be pleaded in bar to an indictment for bigamy or adultery. It was held, moreover, in *Thomas v. Robinson*, that when the powers of a limited or inferior tribunal are statutory, the act which confers them must be pleaded or adduced in proof. The application of this doctrine is embarrassed by the difficulty under which a court must necessarily labor in determining the rank and status of the tribunals of another State. It has been ingeniously suggested that in the absence of proof a sufficient ground of distinction may be found in the title of the court. *Archer v. Romaine*, 14 Wisconsin, 375; *Jarvis v. Robinson*, 24 Id. 524. In *Archer v. Romaine* a "marine court" was said to be presumably one of limited and inferior powers, while the opposite inference was drawn in *Jarvis v. Robinson*, with reference to a "circuit court."

The presumption that all things were rightly done, will not be carried beyond proper bounds even in the case of superior courts. *Ripe v. Heaton*, 9 Wisconsin, 328. *The Commonwealth v. Blood*, 97 Miss. 338. When the record shows that the proceedings were commenced by publication, or the attachment of goods or land, a judgment, purporting to bind the defendant personally, will be void, and cannot be made the foundation of an action in another State. *Latimer v. The Railway*, 43 Missouri, 105; *Clinton v. Plattner*, 13 Ohio, 209; *Woodward v. Tremere*, 6 Pick. 354; *Ewer v. Coffin*, 1 Cushing, 350.

Under these circumstances, the presumption is adverse to the jurisdiction on what appears, and extrinsic evidence is not admissible to remedy the defect. It would also seem that when there is no entry of service, and only one of the defendants is alleged to have appeared, the court will not presume that the others had notice, and the record will be a mere nullity as to them, on which no recovery can be had in another State. *Darcy v. Ketchum*, 11 Howard, 165. In *Harris v. Hardman*, 14 Howard, 341, a return by the marshal, served on the defendant Hardeman, by leaving a true copy at his residence, was in like manner held to be insufficient, under a rule of court requiring that service should be personal, or if the defendant was absent, by leaving a copy of the writ at his residence at least twenty days before the return thereof; and the statutes of Mississippi, which directed that when the defendant could not be found, service should be effected by leaving a copy of the writ with his wife, or some member of his family above the age of sixteen years, or if no such person would receive it, then by leaving it in some public place at the dwelling of the defendant. In this instance, however, the question arose on a motion made in the do-

mestic forum to quash the judgment, and not collaterally or in another State.

If the defendant in a suit commenced by attachment without service, appears or gives security to dissolve the lien, a judgment subsequently rendered will bind him personally, and may be enforced by action in another State. *Blyler v. Kline*, 14 P. F. Smith, 130; *Mahew v. Thatcher*, 6 Wharton, 129; *Shumway v. Stillman*, 6 Wend. 447; *Noyes v. Butler*, 6 Barb. 613. In *Bissell v. Briggs*, 9 Mass. 468, it was however said by Chief Justice Parsons, that a defendant would not give the court jurisdiction over his person, by appearing to release his property or contest the justice of the demand under which it was attached; and the point was so decided in *Pawling v. Bird's Ex'rs*, 13 Johnson, 206.

It still remains to inquire how far the record is conclusive on the question of jurisdiction, and whether the recitals which it contains can be impeached by extrinsic evidence. In considering this point, we may properly advert to the rule which prevails in the case of domestic judgments.

At common law a record imported absolute verity, and evidence could not be received to contradict or vary anything that it averred. *Freeman v. Leonard*, 7 Allen, 54; *Cook v. Darling*, 18 Pick. 393; *Harshey v. Blackmarr*, 20 Iowa, 161. But this did not preclude an examination of the proceedings for the purpose of discovering whether the due course of law had been pursued. Accordingly, when a judgment was brought for examination before a superior court on error, the want of a warrant of attorney, might be assigned as a ground of reversal. *Banning v. Taylor*, 12 Harris, 289; *Bradburn v. Taylor*, 1 Wilson, 85; *Morris v. Fletcher*, Croke Car. 53; *Arundel v. Arundel*, Croke Jac. 10. The common law was rigorous in requiring notice and appearance, or that the authority of the attorney who assumed to represent the party should be verified by filing a duly authenticated warrant, and a failure to observe this form might be taken advantage of at any stage of the proceedings, although the defect was cured after verdict by the statute of Jeofails, and might be remedied when the judgment was by confession or default by filing the warrant *nunc pro tunc* after the record had gone up, and bringing it before the Superior Court by a *certiorari* issued on a suggestion that there was matter in the court below which had not been returned. *Vincent v. Bodurdo*, 2 Keble, 199; *Dayrell & Thinn's Case*, 1 Leonard, 22; *Bishop's Case*, 5 Coke, 376; *Johns v. Bowen*, Croke Jac. 597; *Dyke v. Sweeting*, 1 Wilson, 181; *Viner Abridg. Error*, L., a. pl. 7, 9; *Banning v. Taylor*. Here the error was discernible on the face of the proceedings, and no averment could be made against the record with a view to showing either that the attorney was not duly authorized, or that the defendant did not appear.

*Callen v. Ellison*, 13 Ohio, N. S. 446. This is true even in the course of proceedings for the discovery and correction of error, and applies *a fortiori* when the question arises collaterally, or in an action brought to enforce the judgment. *Weyer v. Zune*, 3 Ohio, 257; *Legrange v. Warl*, 11 Id. 257; *Field v. Gibbs*, 3 Peters, C. C. R. 155; *Vandyke v. Bastedo*, 3 Green, 224; *Clarke v. McCannon*, 7 W. & S. 469; *Tichout v. Cilley*, 3 Vermont, 415; *St. Albans v. Bush*, 4 Id. 58; *Pillsbury v. Dugan*, 9 Ohio, 117; *Cook v. Darling*, 18 Pick. 393; *Granger v. Clarke*, 22 Maine, 128; *Huntington v. Charlotte*, 15 Vermont, 46. In *Cook v. Darling*, a plea to an action of debt or the judgment of a county court that the defendant did not reside in the State where the original suit was instituted, was not summoned, and did not appear or take defence, was accordingly overruled on demurrer.

A similar decision was made in *Granger v. Clark*, where the plea in addition to the averments made in *Cook v. Darling*, contained the further allegation, that the judgment had been obtained through fraud. The court said, that the remedy of the defendant lay in an application to set the judgment aside, or in a writ of error. It was decided in like manner in *Hill v. Hiffly*, 6 Yerger, 444, that a judgment could not be questioned collaterally on grounds not disclosed by the record.

A denial of the authority of the attorney, who appeared for the defendant, or brought the suit, is equally inadmissible, as throwing that open to controversy, which the judgment has closed. *Callin v. Ellison*, 13 Ohio, N. S. 449, 455; *Holbert v. Montgomery's Ex'rs*, 5 Dana, 11; *Finneran v. Leonard*, 7 Allen, 54; *Blood v. Crandall*, 2 Williams, 336; *St. Albans v. Bush*, 4 Vermont, 58; *Ward v. Baker*, 1 E. D. Smith, 423; *Coit v. Haven*, 30 Conn. 190. The presumption is, that the court before deciding the case, ascertained all the jurisdictional facts necessary to render the decision valid, and this inference is one that cannot be directly or indirectly countervailed by proof. It is the judgment which gives force and conclusiveness to the record of the proceedings, by raising a presumption that they were considered and approved by the court, and not the record of the proceedings to the entry of the judgment. *Newcomb v. Peck*, 17 Vermont, 302. This is the more obvious, because the record as made up on a return to a writ of error, or with a view of being used as evidence in another suit, passes over the various steps taken to notify the defendant, and begins with a recital, that he was summoned to answer the demand of the plaintiff. Hence, in declaring on a judgment, it is enough in general to set the adjudication forth as the ground of liability, without alleging that the defendant was served with process or that he appeared.

It can seldom be competent for the defendant to deny that which the plaintiff need not aver or prove, and a plea that the defendant was not served with process, or that the attorney who appeared for him acted

without authority, is accordingly inadmissible in a suit founded upon a judgment pronounced by a domestic and superior court. This is quite consistent with the well established principle, that notice is essential to jurisdiction. When the want of notice is admitted or appears affirmatively of record, the judgment will fail; *Moore v. Starks*, 1 Ohio, N. S. 369; *Trimble v. Longworth*, 13 Id. 431, 438; but a plea denying notice is bad, because there is a presumption of notice, which cannot be overthrown. 1 Smith's Leading Cases, 6 Am. ed.; *Callin v. Ellison*, 13 Ohio, N. S. 446, 456; *Fowler v. Whiteman*, 2 Id. 270, 286. Under these circumstances the common law remits the injured party to his writ of error, or an application to the court which rendered the judgment, to set it aside and allow him a hearing on the merits; *Banning v. Taylor*, 12 Harris, 289; or he may in some instances, maintain a suit against the sheriff who returned the writ, or the clerk by whom the record was made up.

The doctrine that judgment should not be given *ex parte*, nor until both sides shall have had an opportunity of being heard, is reconciled by these means with the respect due to the proceedings of the tribunals intrusted with the administration of justice. *Callen v. Ellison*, 13 Ohio, N. S. 446, 455; *Coit v. Haven*, 30 Conn. 190.

In like manner, the authority of the attorney who represented the defendant cannot be traversed in a suit on a domestic judgment, because the effect would be to destroy the certainty of judicial decision, by transferring the determination of a jurisdictional fact from the forum to which it properly belongs, to another where it cannot well or safely be considered. *Callen v. Ellison*. A judgment will not be set aside even in the court where it originated, on the ground that the attorney was not duly authorized, unless he is unable to respond in damages; 1 Kebler, 89; 1 Salkeld, 88; *Denton v. Noyes*, 5 Johnson, 296; *Field v. Gibbs*, 1 Peters, C. C. R. 155; *Munykuson v. Dorsett*, 2 H. & Gill, 274; *Banning v. Taylor*, 12 Harris, 289, 293; or where the plaintiff takes the responsibility of accepting an appearance or confession of judgment without putting the defendant on his guard by the service of process, when relief will be given on equitable grounds, without regard to the solvency of the attorney. *Robson v. Easton*, 1 Term, 59; *Bayles v. Buckland*, 1 Exchequer, 1; *Cox v. Nichols*, 2 Yeates, 546; *Cowper v. Anawalt*, 2 Watts, 490; *Holker v. Parker*, 7 Cranch, 436; *Critchfield v. Porter*, 3 Ohio, 518; *Handley v. Stalor*, 6 Littell, 186; *Banning v. Taylor*, 12 Harris, 289.

Whatever may be thought of the right to show a want of jurisdiction by averment in opposition to the record, it is universally conceded that when such a defect appears on the face of the proceedings, the judgments of all courts, foreign or domestic, will be null and void. *Gossett v. Howard*, 10 Q. B. 359, 452; *Fowler v. Park*, 3 Mason, 289; *Picquet*

v. *Swann*, 5 Id. 42; *Barkman v. Hopkins*, 5 English, 157, 166; *Moore v. Starks*, 1 Ohio, N. S. 369; *Trimble v. Long*, 13 Id. 431; *Holt v. Allovay*, 2 Blackford, 108; *Fullerton v. Horton*, 11 Vermont, 425; *Bimeler v. Dawson*, 4 Scammon, 536. The reason is, that when an authority is confined within certain limits, an act which transcends them is necessarily invalid. This is a general principle applying to every power, whether derived from the State or conferred by an individual. The jurisdiction of the great courts at Westminster was general, not universal, and the Common Pleas could not take cognizance of a criminal information, nor the King's Bench of a writ of right. 1 Smith's Leading Cases, 1096; *The Case of the Marshalsea*, 10 Coke, 68, 75, 77; *The Columbian Insurance Co.*, 99 Mass. 287. If a Circuit Court of the United States were to try and convict a citizen of a libel, or if a State court whose jurisdiction was merely civil should entertain a prosecution for a crime, the adjudication would be *coram non judge*, and could neither be relied on as a ground for detaining the alleged offender, nor as a justification by the officer who assumed to execute the sentence of the court. *Williamson's Case*, 3 Casey, 359, 452. In like manner, a grant of letters testamentary by the Quarter Sessions, or a judgment in assumpsit by a court of probate would be merely void, and neither establish the validity of the will, in the former instance, nor bind the person or estate of the defendant, in the latter. *Williamson's Case*. While, therefore, it is true in general that the proceedings of a court of record cannot be drawn in question collaterally, and will be binding until set aside or reversed on error, the principle does not apply unless the court had jurisdiction over the cause and the parties. *Shriver's Lessee v. Lynn*, 2 Howard, 43; *The Lesser of Hickey v. Stewart*, 3 Id. 750; *Stricker v. Kelley*, 7 Hill, 11; *The People v. Cussillis*, 8 Id. 161; *Harrington v. The People*, 6 Barbour, 607.

Superior courts may, however, be supposed to know the limits of their powers, and will be presumed not to have exceeded them unless the contrary is apparent; *Voorhies v. The U. S. Bank*, 10 Peters, 472; *Grignon's Lessee v. Aslor*, 2 Howard, 219; and the better opinion would seem to be that when the subject matter is within the authority of the court, it will be presumed to have been duly exercised as it regards the parties. *Horner v. Doe*, 1 Indiana, 130; *Conrad v. Johnson*, 12 Id. 136. It has, however, been said, in some instances, that as notice is essential to confer jurisdiction, no judgment can be valid unless the record shows that the defendant had an opportunity of being heard; *Gwinn v. McCarroll*, 1 S. & M. 368; *Steers v. Steers*, 3 Cushman, 513; while there are cases which go further and to the point, that judicial proceedings may be avoided by proof that notice was not given, in opposition to a positive averment that the defendant was served with process or appeared; *Edwards v. Toomer*, 14 S. & M. 75; *Smith*

v. *The State*, 13 Id. 140; although it is admitted, even under this course of decision, that a recital of the service of the writ is *prima facie* evidence, and will be regarded as true until evidence is adduced on the other side. *Saffarans v. Terry*, 12 Smedes & Marshall, 690; 1 Smith's Leading Cases, 1021, 6 Am. ed. In some of the instances in which these principles were asserted, the tribunal was foreign or of inferior jurisdiction; *Borden v. Fitch*, 15 Johnson, 141; *Mills v. Martin*, 19 Id. 33; *Latham v. Edgerton*, 9 Cowen, 227; *Irving v. Dickerson*, 21 Indiana, 308; but they have been laid down in others with reference to the superior courts of the same State. *Owen v. McCarrol*, 1 Smedes & Marshall, 354; *Evans v. Smith*, 7 Id. 85; *Shaeffer v. Yates*, 2 B. Monroe, 453; *Campbell v. Brown*, 1 Howard's Mississippi, 106. In *Hollingsworth v. Barbour*, 4 Peters, 446, a decree of a county court directing the sale of the land of a defendant who resided beyond the limits of the State, and had received no notice of the institution of the suit, was held inoperative, and jurisdiction over the parties said to be as essential as jurisdiction over the cause. Similar language was held by the Supreme Court of New York, in *Denning v. Corwin*, 11 Wend. 648, and more recently in *Noyes v. Butler*, 6 Barbour, 613, and *Hard v. Shipman*, Ib. 621. The point actually decided, however, in *Denning v. Corwin*, was the well established one that where a court of general powers proceeds under a special authority, not according to the course of the common law, their proceedings will be judged by the rules applicable to the acts of limited and inferior tribunals. 1 Smith's Leading Cases, 1011, 6 Am. ed.; *Folger v. The Insurance Co.*, 99 Mass. 287; *Sharp v. Speir*, 4 Hill, 76; *Stricker v. Kelly*, Ib. 11. And some of the decisions in New York carry the doctrine that a superior tribunal which has jurisdiction over the cause, must be presumed to have exercised it in the proper manner by giving notice to the parties, to the furthest extent compatible with justice. In *Foot v. Stevens*, 17 Wend. 483, the soundness of the position taken in *Denning v. Corwin*, was controverted, and it seems to have been thought that where the judgment of a court of general powers is still standing and unreversed, it cannot be impeached or set aside collaterally, because the record does not set forth that the due course of procedure was pursued, or that the court acquired jurisdiction over the parties through the service of a process or a voluntary appearance. It was held to follow that the plaintiff might maintain an issue joined on a plea of *nul tiel record* to an action of debt in the Supreme Court of New York, on the judgment of a county court, by producing the record of a judgment by default, which did not aver that the defendant was summoned or that he came in and took defence.

The point actually decided in this case was, that notice may be presumed in the case of a superior court, when the question arises collaterally

in another tribunal; but in *Hart v. Seivas*, 21 Wendell, 40, this presumption was applied with less reason to sustain proceedings, which had been brought before a higher court for revision. The question arose on a writ of error to a judgment rendered by the Court of Common Pleas, and the objection taken was, that the record did not show that the defendants were summoned or that they appeared. This was held not to be error, on the ground that every intendment was to be made in favor of the proceedings of superior courts. The Common Pleas were a court of general powers, and must be presumed to have taken the proper steps to obtain jurisdiction over the parties before entering the judgment. The case of *Foot v. Stevens*, 21 Wend. 483, was cited and relied on as establishing that the failure of the record to show notice or appearance, did not render the judgment void. Bronson, J., in dissenting from the majority of the court, showed that this decision was not in point, because the question arose collaterally in an action on the judgment, and not in the course of proceedings for the discovery and correction of error. In *Kempe's Lessee v. Kennedy*, 5 Cranch, 173, 185, Ch. J. Marshall, had said, that although the want of a recital that the court had acquired jurisdiction over the person of the defendant did not render the judgment a nullity, it was erroneous and might clearly be reversed.

The only redress left under the view taken in *Hart v. Seivas*, to a party injured by an *ex parte* judgment, is an application to the tribunal by which the wrong was done, who may act as they think proper, without the salutary check imposed by a knowledge that their proceedings are liable to be reviewed. It is true, as Cowen, J., remarked, that the record as returned in obedience to the mandate of a writ of error begins with a brief recital, that the defendant was summoned, or that he was in custody, without setting forth the writ or the return made to it by the sheriff. Viner Error, E. c. pl. 4, 5, 6, 11, G. c. But it was still open to the defendant to allege, that the proceedings anterior to the declaration were defective, and bring them up for examination on a *certiorari* issued on the ground of a diminution of record; *Dayrell & Thinn's Case*, 1 Leonard, 22; *Johns v. Bowen*, Croke Jac. 597; *Bishop's Case*, 5 Coke, 37; *Pechey v. Harrison*, 1 Lord Raymond, 232, Viner, L. a. pl. 7, 9; and the judgment was then open to reversal, unless the objection could be obviated by a fictitious suggestion, that the return to the *certiorari* was incomplete, and issuing another which gave an opportunity to supply any omission that was formal or accidental, and send the record as amended to the court above. *Banning v. Taylor*, 12 Harris, 289, 292. But although merely technical defects might be corrected in this way, those which were substantial could not, and were necessarily fatal, unless they had been waived by appearing and putting the case at issue on the merits. The want of service may obviously be made good by a voluntary appearance; *Cross v. Carroll*,



Croke Elizabeth, 665 ; but the better opinion would seem to be that, when a full examination of the record fails to show that the defendant was notified or that he appeared, the case is not one in which the want of proof can be supplied by inference. See *Banning v. Taylor*, 12 Harris, 289, 292 ; *Harris v. Hardiman*, 14 Howard, 344 ; *Bruce v. Wait*, 1 M. & G. 1 ; *Schloss v. White*, 16 California, 65 ; Viner Error, N. pl. 8 ; *Jenkins*, 37, pl. 5 ; *Lovelace v. Jenniper*, Croke Jac. 311.

It was said in *Gore v. Parkhurst*, Croke Eliz. 223, that where it does not appear of record that the defendant was in custody at the time of declaration filed, the judgment is erroneous, and should be reversed ; and in *Lancaster v. Sedley*, Hobart, 364, that it would be a sufficient assignment of error that the defendant was neither in custody, nor at large on bail. So strictly is the principle enforced in England, that to render a foreign attachment valid, it must be preceded by a summons to the defendant, and a return that he cannot be found ; *Bruce v. Wait*, 1 Manning & Granger, 1 ; *Fisher v. Lane*, 3 Wilson, 297 ; 2 W. Bl. 834 ; *Anderson v. Young's Ex'rs*, 4 Harris, 443, 447 ; and in *Bruce v. Wait*, the judgment was reversed for the want of this preliminary.

In *Banning v. Taylor*, 12 Harris, 289, 292, the court said that, by Magna Charta, no one could be condemned save by the judgment of his peers or the law of the land, and the constitution of Pennsylvania, was to the same effect. The law of the land meant due process of law, and no one could prevail against another without such process, unless the defendant appeared voluntarily in person or by attorney. In the latter alternative, the warrant of attorney should be filed with the appearance, and if it was not, the judgment would be reversed on error or stricken off in the court below, unless the defect was cured by filing a warrant *nunc pro tunc*.

In *Bloom v. Burdick*, 1 Hill, 148, the court recurred to the ground taken in *Denning v. Corwin*, and it was said that however large the powers of a court might be, the judgment would be void if they were not pursued. And in *Williamson v. Berry*, 8 Howard, 494, and the *Lessee of Hickey v. Stewart*, 3 Id. 750, it was declared broadly by the Supreme Court of the United States, that when one tribunal is asked to enforce the judgment of another, the jurisdiction of the latter is always open to examination. And this is no doubt true if taken with the qualification that when the proceedings of superior courts are drawn in question collaterally, the silence of the record will be supplied by intendment and the proceedings held valid unless manifestly beyond the authority of the court. The inquiry in every such case is one of law, to be determined by the record. If that contains enough to support the judgment, it is irrefragable, if it does not, the deficiency cannot be supplied by extrinsic evidence. A judgment without notice is contrary to the due course of

law guarantied by the constitutions of the Union and of the several States, but the presumption of notice may, where the judgments of superior courts are concerned, take the place of proof. *Callen v. Ellison*, 13 Ohio, N. S. 446, 455; *Trimble v. Longworth*, *Ib.* 431, 439.

The distinction would, therefore, seem to be between collateral proceedings and those for the discovery and correction of error. Notice may be presumed in the former case; *Moore v. Starks*, 1 Ohio, N. S. 369, 373; *The Bank v. Judson*, 4 Selden, 254; *The Bank v. Doe*, 1 Indiana, 130; *Gerrard v. Jackson*, 12 *Id.* 636; but it must appear affirmatively in the latter to save the judgment from reversal; *Hawkins v. Hawkins*, 28 *Ind.* 66; *Abedil v. Abedil*, 26 *Ind.* 287; *Hough v. Canby*, 8 Blackford, 301; *Bodurtha v. Goodrich*, 3 Gray, 508; *Trimble v. Longworth*, 13 Ohio, N. S. 431, 439; *Fowler v. Whiteman*, 2 *Id.* 70; *Sanford v. Sanford*, 28 Conn. 6; 1 Smith's Leading Cases, 1020, 6 Am. ed.; and no such presumption will be made in favor of the jurisdiction of an inferior court, or of a court acting under a special statutory authority. *Snyder v. Snyder*, 25 *Ind.* 399; *Folger v. The Ins. Co.*, 99 Mass. 267. And in *The Commonwealth v. Blood*, it was held to follow, that as the power to grant divorces is given by statute, and was unknown to the common law, a divorce granted in one State is not binding in another, unless the record contains enough to show that the court had jurisdiction over the parties as well as the cause.

If we now turn to the judgments of other States, it will appear from the authorities taken as a whole, that a general allegation that the party appeared or had notice, will not preclude him in the one case from showing that the notice was not so given as to be effectual, or from disproving the authority of the attorney who entered the appearance in the other. *Wilson v. The Bank of Mount Pleasant*, 6 Leigh, 570; *Gleason v. Dodd*, 4 Metcalf, 133; *Aldrich v. Kinney*, 4 Conn. 380. The opinion expressed in *Hall v. Williams*, 6 Pick. 222 (*ante*), that the record cannot be controverted even for the purpose of showing that the court did not take the necessary steps to obtain jurisdiction, may be regarded as overruled by the subsequent decisions, which establish that if this is true with regard to domestic judgments it does not apply when those of other States are in question; *Finneran v. Leonard*, 7 Allen, 54; and that an entry or recital that the party filed a declaration or appeared and took defence, or that he was substituted as administrator on the death of the person who brought the suit originally, may be explained or overthrown by proof, that the act was that of an attorney who was not duly authorized, *Gleason v. Dodd*; *Wilson v. Bank*; *Aldrich v. Kinney*; *Thompson v. Emmert*, 15 Illinois, 415; *Lawrence v. Jarvis*, 32 *Id.* 304; *Shumway v. Stillman*, 4 Cowen, 292, 6 Wend, 447. In like manner where process was served on one of two defendants and

a general appearance entered opposite the names of both, it was held admissible to show that the attorney was only authorized to represent the former and that the latter was consequently not bound by the judgment. *Pheps v. Brewer*, 9 Cushing, 390. So also a divorce granted on the application of the husband, may be avoided collaterally by evidence that the wife was not domiciled in the State where the decree was pronounced; was not served with process, and did not appear. *Commonwealth v. Blood*, 97 Mass. 338; *Elder v. Reel*, 12 P. F. Smith, 308; *Colvin v. Reed*, 5 Id. 378; *Borden v. Fitch*, 15 Johnson, 140.

In these instances, however, and others of a like kind, the courts have relied on the well known rule that estoppels must be certain, as a reason for admitting evidence, that might have been shut out by a clear and positive recital. There was said to be no direct or necessary conflict between an averment on the one part, that the defendant appeared, and proof on the other, that the appearance was by an attorney who did not represent the defendant. And there has been a manifest reluctance to go beyond this and assume the responsibility of holding that an unequivocal allegation, that the defendant was served personally or entered a personal appearance, can be disproved by parol evidence. In *Gleason v. Dodd*, the court declined to express an opinion on this point, and contented themselves with saying that there was no doubt of the right to give evidence, which tended to disclose the truth without falsifying the record. A similar distinction between the effect of a precise and of a merely general allegation of notice was drawn in *Wilson v. The Bank*, 6 Leigh, 575; and *Wilcox v. Kassick*, 2 Michigan, 165; and the former spoken of as absolutely binding, while the latter was said to be open to contradiction. It was held in like manner in *Wood v. Watkins*, 17 Connecticut, 300, that notice might be denied when the record was silent, but not when it contained an express averment; while in *Pierce v. Olney*, 20 Connecticut, 345, the court seem to have thought that a recital of appearance would be conclusive under ordinary circumstances, although they allowed an averment, that the defendant had appeared to an action brought against him in the State of New York, to be explained by a statute of that State, which directed the clerk of the court where the judgment was rendered, to enter an appearance for defendants who were beyond the reach of process.

Dicta of a like kind may be found in *Lincoln v. Tower*, 2 McLean, 473, 487; and *Wilcox v. Kassick*, 2 Michigan, 165; while it has been said in various other instances, that the right to contest the jurisdiction of the courts of other States will fail, when brought in conflict with a direct and positive averment of record, and that an appearance so alleged cannot be traversed, although the authority of the attorney who entered it may be denied. *Bimeler v. Dawson*, 4 Scammon, 536;

*Welch v. Sykes*, 1 Gilman, 197; *Thompson v. Emmert*, 15 Illinois, 115. A similar view was taken in *Lawrence v. Jarvis*, 32 Illinois, 309; and the defendant said to be free to show that the attorney was not authorized to appear for him, but not that the attorney did not appear. If this is all that the cases above cited establish, the language held in some of them implies that the court would have gone further, and to the extent of permitting a flat contradiction of the record, if necessary to protect the defendant against a judgment, rendered without jurisdiction or the necessary steps to make it effectual. *Rape v. Heaton*, 9 Wisconsin, 328; *Gleason v. Dodd*, 4 Metcalf, 133; *Pollard v. Baldwin*, 22 Iowa, 328; *Ewer v. Coffin*, 1 Cushing, 23; *Finneran v. Leonard*, 7 Allen, 54. In *Starbuck v. Murray*, 5 Wend. 148; the defendant was accordingly held entitled to contradict an explicit declaration, that he had appeared and taken defence to the action. "It has been strenuously contended," said Marcy, J., in delivering the opinion of the court, "that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard, to impeach it. It appears to me, that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to the original action, all the State courts, with one exception, agree in opinion, that the paper introduced, as to him, is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence, by a process of reasoning, that is, to my mind, little less than sophistry. The plaintiffs, in effect, declare to the defendant: 'The paper declared on is a record, because it says, you appeared, and you appeared because the paper is a record.' This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendants put in issue (and the whole current of State court authority show it to be a proper issue) is the validity of the record; and it is contended, that he is estopped by the unimpeachable credit of that very record, from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction. So long as the question of jurisdiction is in issue, the judg-

ment of a court of another State is, in its effect, like a foreign judgment, *prima facie* evidence; but for all the purposes of sustaining that issue, it is examinable into, to the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes, should receive full faith and credit."

In *Harris v. Hardeman*, 14 Howard, 336, 340, this decision was cited and relied upon as an authoritative exposition of the law, and the same doctrine may be found in *Noyes v. Butler*, 6 Barb. 613, and *Wilson v. The Bank of Mount Pleasant*, 5 Leigh, 570. In *Norwood v. Clarke*, 24 Texas, 551, proof that the defendant was not served with process, was in like manner held admissible, although the record set forth that service was effected. In *Rogers v. Gwin*, 21 Iowa, 58, and *Rape v. Heaton*, 9 Wisconsin, 328, the court obviously inclined in this direction, although the point was said to be in doubt.

Whatever the rule may be where there is no loophole, the court may unquestionably be astute to find an opening for the admission of the truth (ante). Hence a recital that the party appeared, or was substituted of record, will not preclude him from showing that he did not appear in person; *Gleason v. Dodd*, 4 Metcalf, 133; nor will an allegation that he appeared in obedience to a summons, exclude proof that he was not present at, and did not take part in the trial. *Rogers v. Gwin*, 21 Iowa, 58. So it was held in *Pollard v. Baldwin*, 22 Iowa, 328, in accordance with *Starbuck v. Murray*, that a recital that a defendant was "served" or "duly served" might be disproved by parol.

On the other hand, several decisions may be found in which the force of an estoppel has been attributed to a precise and definite recital of notice or appearance in the record of another State. *Bimeler v. Dawson*, 4 Scammon, 536; *Wilcox v. Kassick*, 2 Mich. 165, 177; *Spencer v. Brockway*, 1 Ohio, 359; *Goodrich v. Jenkins*, 6 Id. 43; *Evans v. Justine*, Ib. 117; *Newcomb v. Peck*, 17 Vermont, 302; *Lapham v. Briggs*, 1 Williams, 26; *Pritchett v. Clark*, 4 Harrington, 280. Thus in *Warren v. Lusk*, 16 Mo. 102; *Harbin v. Chiles*, 20 Id. 314, and *Wilson v. Kassick*, the court held that when the record of the judgment on which the suit is brought avers that service was made upon the defendant, or that he appeared, he cannot contest the truth of the allegation, or show that the attorney who entered the appearance was not duly authorized. The same point was determined in *Newcomb v. Peck* and *Lapham v. Briggs*, and a recital that the defendant had appeared, said to be as much beyond the reach of contradiction, as in the case of a domestic judgment.

A similar doctrine was announced in *Westervelt v. Lewis*, 2 McLean, 511; while in *Roberts v. Caldwell*, 5 Dana, 512, the Kentucky Court

of Appeals treated the averment of an appearance by attorney as incontrovertible and conclusive on the question of jurisdiction. But it is generally conceded, that when the service set forth on the record of the judgment, is manifestly *in rem*, as when it is a mere attachment of property without notice to the defendant, the presumption will be that there was no personal jurisdiction, unless there is enough to show that it really existed. *Pelton v. Platner*, 13 Ohio, 200; *Pierce v Hickok*, 39 Vermont, 292. In *Wilcox v. Kassick*, 2 Michigan, 165, 177, the subject was elaborately considered, and the result of the authorities said to be, "First. That in an action brought upon the judgment of a court of general jurisdiction of another State, no plea or proof can be received in contradiction of any material fact appearing by the record, unless such plea or proof would be received in an action upon the judgment in the court in which it was rendered. Second. That if the record shows a want of jurisdiction, the judgment is a nullity. Third. That if the record does not show either that the court had, or that it had not jurisdiction, the jurisdiction will be presumed, but in such case facts showing a want of jurisdiction, may be alleged by plea, and if established, a recovery may thus be defeated. And, Fourth. That when the record shows that the process was not personally served, and that the defendant did not appear in person in the suit, but that an attorney of the court appeared for him, the authority of such attorney will be presumed."

The cases are obviously irreconcilable and something may be said on either side. If the statutory provision, that a judgment shall have the same faith and credit as in the State where it was rendered, extends to the proceedings of the court as set forth of record, a denial of notice, or of the authority of the attorney, will be as inadmissible in a suit on judgment of another State as it confessedly is when the action is based on a domestic judgment. If, on the other hand, the design of the Constitution, as interpreted by the statute, is that the judgment should not be conclusive unless the court had jurisdiction of the cause and the parties, there will always be room for the preliminary inquiry, whether the defendant was notified or appeared voluntarily without process. Between these views there is, seemingly, no middle ground, and the balance of convenience inclines strongly in favor of the latter doctrine. *Rape v. Heaton*, 9 Wisconsin, 329, 335. To send a man who is prejudiced by a false or fraudulent recital of notice or appearance to the other side of the continent for redress, is equivalent to a denial of justice. Theoretically, his remedy may be perfect, but the distance and expense are formidable obstacles in practice. An application to the court which pronounced the judgment, requires time, and may meet with unexpected delays, and it can seldom be successful in the ordinary course of procedure before the suit on the judgment is pushed to execution. The

difficulty increases with the growth of the Republic, and is greater now than when the United States were confined to a narrow strip on the Atlantic seaboard. The object of the Constitution is, therefore, best attained by holding that while the judgment of a sister State is conclusive on the merits, it will not preclude the defendant from showing that the court was not authorized to render the judgment, or that he was not subject to the authority of the court. *Coit v. Haven*, 30 Conn. 190, 198.

Whatever doubt may exist on these points, it is conceded that jurisdictional averments are, when sufficiently precise and definite, *prima facie* evidence, which will stand good until disproved. *Pollard v. Baldwin*, 22 Iowa, 328. The law was so held in *Cheever v. Wilson*, 9 Wallace, 123, when Mr. Justice Swayne said, that if a judgment was conclusive in the State where it was rendered, in was equally conclusive everywhere in the courts of the United States. It had been contended that the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question was as to the reality of her new residence and of the change of domicil. That she did reside in the county where the petition was filed, was expressly found by the decree. Whether this finding was conclusive, or only *prima facie* evidence, was a point on which the authorities were not in harmony. The court did not deem it necessary to express any opinion upon the point. The finding was clearly sufficient until overcome by adverse testimony, and none adequate to that result had been adduced. See *Smith's Leading Cases*, 1003, 6 Am. ed.

The rule that a general authority cannot be limited by restrictions which are not made known to the parties interested, applies where a defendant seeks to avoid the obligation of a judgment by evidence, that the attorney by whom it was confessed or entered, was not duly authorized. It may be shown, that he was not retained by the defendant, but not that he exceeded his authority. *Crawford v. White*, 17 Iowa, 560. And this will be true, even when the allegation is accompanied by a charge of collusion between the plaintiff and the attorney, unless the judgment is in excess of the amount due; *Crawford v. White*; it being well settled, that equity will not ordinarily open a judgment, on the ground that it was obtained by fraud, when there is no defence on the merits. *Luckenback v. Wilson*, 11 Wright, 33.

It is obviously essential to the effectual operation of the design of the Constitution, that the records of the judgments of other States, duly authenticated under the act of Congress, should not merely prove themselves, but give rise to a presumption that the court possessed the authority which it assumed to exercise. *Williams v. Preston*, 3 J. J. Marshall, 603; *Mills v. Stewart*, 12 Alabama, 90; *Latine v. Clements*, 13 Georgia, 246; *Bissell v. Briggs*, 9 Mass. 462; *The Bank of the United*

*States v. The Merchants' Bank of Baltimore*, 7 Gill, 415, 439; *Rathbone v. Terry*, 1 Rhode Island, 53; *Wilcox v. Kassick*, 2 Michigan, 165; *Rae v. Hulbert*, 17 Ill. 572; *Harvey v. Tyler*, 2 Wallace, 328; *Carleton v. Bickford*, 13 Gray, 593; *Knapp v. Abell*, 10 Allen, 485. The point was so held in *Clark's Adm'r v. Day*, 2 Leigh, 172, and *Kent v. Mundall*, 9 Id. 12, notwithstanding the objection, that the jurisdiction of the courts of another State depends on its statutes, and is a question of fact, which does not appear of record, and must be proved by parol evidence. The presumption *omnia rite acta* will accordingly hold good until repelled, and the burden of proof is on him by whom a record duly authenticated and which appears to be regular, is impugned, *Buffum v. Stimpson*, 5 Allen, 591; *Bissell v. Wheelock*, 11 Cushing, 277. Accordingly, when the validity of a judgment is assailed on grounds depending on the local law, and which would not be sufficient on general principles, the defence must be specifically averred and established by appropriate evidence. *Wheeler v. Raymond*, 8 Cowen, 314; *Jarvis v. Robinson*, 21 Wisconsin, 523. Hence, it will not be enough to allege generally, that the proceedings were not within the jurisdiction of the court, or that a party against whom judgment has been rendered as executor, was not legally authorized to represent the testator, without pointing out the defect, and giving all the facts in evidence, which are necessary to show that it exists. *Robertson v. Struth*, 5 Q. B. 94; *Knapp v. Abell*, 10 Allen, 485. A court sitting publicly in another State or Territory, will be presumed to be duly constituted, and to have pursued the authority conferred upon it by the law. If there is a want or excess of power, it must be set forth by plea, and the rule or custom which is alleged to have been violated, shown by some appropriate means of proof. *Robertson v. Struth*.

The laws of another State are, agreeably to numerous authorities, facts which must be given in evidence, and cannot be taken notice of judicially. See *Robinson v. Struth*, 5 Q. B. 94; *Knapp v. Abell*, 10 Allen, 55. Accordingly, when a statute of the original forum is alleged as affording an exception to a judgment which would be valid under the local law, it must be adduced and proved. The rule applies conversely where the statutes of a foreign country are relied on to sustain a judgment, which would be invalid under the law of the place where it is sought to be enforced, and if they are not given in evidence at the trial, the court will not allow them to be introduced during the argument, or made a ground for setting aside the verdict. *Knapp v. Abell*, 10 Allen, 485.

While this is confessedly the rule, as between countries which are wholly alien to each other, having no common bond or government, a different principle may apply among States, which like those of the American Union, are for many purposes one nation and governed by the



same organic statute. *The State of Ohio v. Hinchman*, 3 Casey, 479. The act of Congress requires, that the acts, records, and judicial proceedings of other States, shall, when duly authenticated, have the same faith throughout the United States, as in the place where they originated, and when a duty is imposed by statute, the means of executing are impliedly conferred. Obviously, a court cannot give the judgment of another State the effect which it would have had in the court when the judgment was pronounced, without consulting the law of the original forum, and ascertaining what it prescribes. A magistrate who has to determine such a question, is necessarily entitled, if not bound, to have recourse to every appropriate source of judicial knowledge. This inference is the more reasonable, because the adjudications of the courts of the various States form a body of jurisprudence which is habitually consulted through authentic channels. The better opinion would accordingly seem to be, that in ascertaining the credit due to the judgments of a sister State, regard should be had to the law of the original, as well as of the domestic forum, and such weight given to the judgment, as may be due under the rules or principles of both. *Butcher v. The Bank*, 4 Kansas, 70; *Rae v. Hubbler*, 17 Illinois, 572, 578. See *Ennis v. Smith*, 14 Howard, 400, 429.

The presumption in favor of the conclusiveness and validity of the proceedings of the tribunals of other States, should not therefore preclude a court from taking judicial cognizance of any legal defect which would render them invalid in the forum where they originated. *Folger v. The Insurance Co.*, 99 Mass. 267; *Dimick v. Brook*, 21 Vermont, 569. Unless this course is pursued, the anomalous result may follow of a judgment binding everywhere except at home. So a judgment which would fail if tested by the common law may be sustained by referring to the statutes of the State where it was pronounced. *The State of Ohio v. Hinchman*.

The question whether judicial cognizance can be taken of the laws of other States in discharging the duty imposed by the Constitution, was considered in the case of the *State of Ohio v. Hinchman*, 3 Casey, 479, and the objection that the jurisdiction of the Probate Court of Ohio, on whose judgment the suit was founded, could not be presumed and was not shown of record, met by the reply that the courts of Pennsylvania were bound under the circumstances to take notice, *ex officio*, of the laws of Ohio. The point arose under the Constitution and laws of the United States, and any judgment that might be rendered would be re-examinable in the Supreme Court of the United States, who would regard the laws of the State of Ohio as domestic statutes, and take cognizance of them as such without averment or proof. Unless the courts of Pennsylvania adopted the same rule, the case would be determined by one standard in the court below, and by another in the

court of error. A similar view was taken in *Barter v. Linah*, 4 Harris, 243, and *Wilson v. Jackson*, 10 Missouri, 330, 336.

The opposite opinion was, however, maintained in *Felton v. Platner*, 13 Ohio, 209; *Drago v. Graham*, 9 Indiana, 212; and *Rape v. Heaton*, 9 Wis. 328, 341; and the true rule said to be that, in the absence of proof, a court could not take notice of the law of another State, and should presume that it was in accordance with their own. It was conceded that a State court must, when a Constitutional question is involved, obey the same rule as the court of last resort; but it was maintained that when the case was brought before the Supreme Court of the United States, it would be the duty of that tribunal to follow the evidence given in the court below, and disregard every fact, however indisputable, which was not proved at the proper time and by the proper means.

These decisions were followed in *Taylor v. Barron*, 10 Foster, 78; 35 N. H. 484, where Bell, J., in delivering the opinion of the court, said that the Constitution made no distinction between superior and inferior tribunals, and was broad enough to include all judgments, whether the tribunals which pronounced them were of general jurisdiction or of the most limited and inferior grade. But Congress had, by providing a particular means of authentication, indicated their intention to exclude the proceedings of courts to which those means did not apply. Unless there was a presiding magistrate, and the record was kept by a clerk, the proceedings could not be attested by the one, nor the requisite certificate given by the other. Such a judgment might be proved in other ways, but was not entitled to faith and credit under the Constitution.

The national legislature must have known that there were inferior tribunals in all the States, whose proceedings could not claim the respect due to those of superior courts, and might reasonably be supposed to have intended that they should have no greater weight or dignity than was accorded to them by the common law. The laws of another State could not be known judicially; they were matters of fact and provable as such. It was therefore not only necessary to aver the jurisdiction of the court in declaring on such a judgment, but to sustain it by producing the statute under which the proceedings took place. The only answer to his argument would seem to be that made in *McElmoyle v. Cohen* (ante), that the faith and credit due to the adjudications of other States are established by the Constitution, and do not depend on the will of Congress.

It has been held to follow from this doctrine that a recovery cannot be had on a judgment rendered in another State by a justice of the peace or other magistrate sitting in an inferior tribunal, unless the pleadings contain enough to show that he had jurisdiction of the cause

and the parties, and the laws of the State are produced and proved in support of the allegation. *Beal v. Smith*, 4 Texas, 305; *Thomas v. Robinson*, 3 Wend. 267; *Taylor v. Barron*; *Snyder v. Snyder*, 25 Indiana, 349.

In *Thomas v. Robinson*, the suit was founded on a judgment given by a justice of the peace in the State of Pennsylvania, and it was contended by the defendant that as the proceedings took place in an inferior tribunal, the jurisdiction must be proved. This objection was sustained by the Supreme Court, who said that although the authority of the justice might have appeared with sufficient clearness to uphold the judgment if the statute law of Pennsylvania had been put in evidence, no such proof had been given, and the court could not take cognizance of the statutes of another State. A similar view was taken in *Drago v. Graham*, 9 Ind. 212; *Snyder v. Snyder*, 25 Id. 349; and *Knapp v. Abell*, 10 Allen, 485.

It is no doubt true that the jurisdiction of inferior tribunals will not be presumed, and must be set forth affirmatively of record. 1 Smith's Ldg. Cases, 991, 6 Am. ed. But this is a technical rule which does not necessarily apply to foreign courts, and a judgment rendered by a justice of the peace would seem entitled to the credit in another State, which is accorded under the principles of international law to the acts of officers performing a public duty and claiming to act under an authority conferred by law. The material inquiry would seem to be whether the court had jurisdiction of the cause and the parties, and if this is answered in the affirmative, the judgment ought not to be disregarded because the facts necessary to give jurisdiction are not set forth of record.

We have seen that the proceedings of an inferior court must set forth enough to show that the court had jurisdiction, but it is not easy to apply this rule to the judgments of other States. The jurisdiction of a court depends on the local law, which cannot, it has been said, be judicially known beyond the limits of the State. In *Roymond v. Wheeler*, 9 Cowen, 295, a plea of a former recovery in a court of common pleas in Vermont, in bar of another action for the same cause in New York, was held insufficient for the want of an allegation that the court was one of general jurisdiction and competent to pronounce the judgment; while in *Jarvis v. Robinson*, an averment that the judgment sued on was rendered by a circuit court of the State of Indiana, was said to raise a presumption that the court was one of general powers, because circuit courts are usually courts of general powers.

The true criterion would seem to have been applied in *Taylor v. Barron*, 10 Foster, 78, 35 New Hampshire, 484. *Prima facie* a declaration on a judgment of another State is good without more, and the

question of jurisdiction does not necessarily arise, until the record is adduced in proof. If the proceedings are authenticated under the act of Congress, by the attestation of the clerk and the certificate of the presiding judge of the court in which they took place, it will be presumed to be one of general powers, and competent to pronounce the judgment. If they are not, the presumption is the other way, and the plaintiff will fail on the issue joined on the plea of *nul tiel record*, unless the declaration contains enough to show the jurisdiction of the court, and the allegation is sustained, by giving the laws of the State in evidence. *Thomas v. Robinson*, 3 Wend. 267. This, at least, would seem to be the rule, if the field of judicial knowledge has not been sufficiently enlarged by the Constitution, to embrace so much of the laws of other States as may be necessary for the true interpretation of their judgments (ante, 649).

A judgment void in the State where it is pronounced, will not be a good cause of action elsewhere. But the suit will not fail, merely because the judgment is erroneous, and might be reversed, unless the defect is one which touches the substance of the controversy or the jurisdiction of the court. *The State v. Helmer*, 21 Iowa, 370; *Milne v. Van Buskirk*, 9 Id. 558. For a like reason, a recovery may be had on a judgment of another State during the pendency of a writ of error; *The Merchants' Insurance Company v. De Wolf*, 9 Casey, 45; *Milne v. Van Buskirk*; *The Bank v. Wheeler*, 28 Connecticut, 433; see *Goodwin v. Goodwin*, 20 Viner's Abridg. 69; Supersedeas, B. pl. 12; *Snook v. Mattocks*, 5 A. & E. 239; although not, as, it would seem, when the plaintiff is under an injunction in the original forum, or the court which pronounced the judgment, have granted a rule to show cause why it should not be set aside. In *Milne v. Van Buskirk*, the court said that the judgment would have full force and effect in Ohio, until reversed, and was entitled to the same credit in Iowa. If the error lay in a want of jurisdiction, the rule would be different. It seems, however, that the court may, in their discretion, stay proceedings in the action on the judgment, pending the writ of error and until it is determined. *Christie v. Richardson*, 3 Term, 78.

It still remains to consider in what way the defence to an action on a judgment of another State must be shaped. We have seen that in *Mills v. Duryee*, *nil debet* was held inadmissible as a plea. The good sense of this decision is obvious, because if the court had jurisdiction, the defendant cannot deny the debt, and if they had not, the defect should be set forth unless it appears on the face of the declaration. *Reed v. Ross*, 1 Baldwin, 36. It was accordingly confirmed in *Hampton v. McConnell*, 3 Wheaton, and is generally regarded as conclusive of the question. *Benton v. Burgot*, 10 S. & R. 240; *Evans v. Talem*, 9 Id. 252; *The Boston Indian Rubber Factory v.*

*Hoit*, 14 Vermont, 92. In *Benton v. Burgot*, a plea that the defendant was not indebted, and a plea that the judgment was obtained by fraud, were held equally invalid; the first as denying an obligation, which appeared conclusively of record; the second as seeking to set at large that which had been judicially determined. A similar view was taken in *Lawrence v. Jarvis*, 32 Illinois, 304; and *McRea v. Mattoon*, 13 Pick. 53; while in *Evans v. Tatem*, *nil debet* and *nul tiel record* were overruled as not affording a sufficient answer to an action on a decree in equity, which, though not a record, had the force and conclusiveness belonging to the adjudication of a duly authorized tribunal.

In *Thurber v. Blackburn*, 1 New Hampshire, 246, *nil debet* was, notwithstanding, said to be a good plea, when the record does not show notice; and a similar opinion was expressed in *Hall v. Williams*, 6 Pick. 232, although the point did not arise for decision. These cases were followed in *Judkins v. The Union M. & F. Insurance Company*, 37 New Hampshire, 470, and the question said to be one of form, depending on the law of the forum.

It would, however, seem, that there is no case where *nil debet* can be a good answer under the doctrines of pleading to an action on a judgment of another State. If the judgment as set forth in the declaration is invalid, the defendant should demur. If the defect appears in the record when produced, it may be taken advantage of under the plea of *nul tiel record*. If both are good, and the objection is one that can only be shown by extrinsic evidence, it should be set forth distinctly by a special plea. There is, however, no reason to doubt the soundness of the conclusion reached in *Beall v. Berryman*, 1 Vroom, 216, that a statute authorizing evidence to be given of a want of jurisdiction under a plea of *nil debet*, attended with notice of the special matter, is valid, and does not conflict with the Constitution of the United States.

It appears to have been thought, in some instances, that in order to render a plea, that judgment was entered without notice or appearance, valid, it must also show that the defendant was not domiciled in the State at the time, or subject to her laws. *Rangeley v. Webster*, 11 New Hampshire, 299; *Holt v. Holloway*, 2 Black, 108. Thus in *Holt v. Holloway*, the court held that to constitute a defence, the plea must, in addition to alleging a want of notice, aver that the defendant was not territorially subject to the authority of the court. The same ground was taken in *Bimeler v. Dawson*, 4 Scammon, 536, and again in *Welsh v. Sykes*, 3 Gilman, 197, where a plea alleging that the defendant was not served with process, and did not appear or take defence, was held insufficient, because there were other grounds on which jurisdiction might be acquired. "These pleas," said Treat, J., in delivering the opinion of the court, "may be true in point of fact, and still the court may have jurisdiction of the person of the defendant. It is competent for each

State to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are nevertheless binding on its own citizens. For aught appearing on the face of these pleas, the defendant may have been a resident of the State of Maryland, and received such notice of the pendency of the suit as conferred authority on the court to hear the case and pronounce the judgment. If he were a resident of another State, it may be, that prior to the commencement of the suit, and in anticipation of its being brought, he retained an attorney to enter his appearance and to defend it. He may have done this, and afterwards have had no personal knowledge of the pendency of the suit. These pleas, like the others, should have contained the additional averments, that he was beyond the jurisdiction of the court, and that he had never authorized his appearance, or such other allegation as would have negatived every presumption of jurisdiction "

So it seems to have been thought in *Price v. Hickok*, 39 Vermont, 292, that a judgment by default in a suit commenced by publication without service of process against a citizen who was temporarily absent, might be a good ground of recovery in another State. A similar view was taken in *Gillman v. Lewis*, 4 Zabriskie, 246, where the court said that to render a judgment of another State invalid for want of jurisdiction, it must appear not only that the defendant was not directly or indirectly served with process and did not appear, but that he was not a citizen of the State at the time, and as such precluded from contesting the validity of a proceeding which might be contrary to natural justice, but was in accordance with her laws. In some of the New England States, a suit might be commenced by the attachment of the property of defendant without personal service, and although a judgment so recovered might not be binding on the citizens of other States, it would undoubtedly be conclusive on a citizen of the State. For a like reason where, as in New Jersey and New York, a service upon one of two or more joint debtors was good on all, *Parker v. The Bank*, 4 Zabriskie, 333, the others could not dispute the validity of the service. Every State Legislature might direct in what manner process should be served, and the citizens of the State could not dispute the validity of the law.

This language would seem to go too far. An absolute government may regulate process in any manner which it thinks proper, or dispense with it altogether and authorize a military or other tribunal to proceed without hearing the other side.

Under these circumstances the defendant is subject to a compulsion which he cannot resist, and it is in vain to talk of right. But a sentence so pronounced is not a judgment in any just sense of the term, and should not be enforced by any court which is free from constraint.

The question is hardly an open one in this country when the courts and Legislature are alike confined within fixed limits. The Constitution follows Magna Charter in declaring that no one shall be deprived of life, liberty, or property, without due process of law, and similar provisions are contained in the constitutions of the several States. By the due process of law, we are to understand, agreeably to the definition given by Mr. Webster, in the *Dartmouth College Case*, 4 Wheaton, 419, that law "which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." *Banning v. Taylor*, 12 Harris, 289, 292. It has accordingly been held that a judgment without notice, or in other words, without such reasonable information of the institution of the suit as to give the parties an opportunity of being heard is a nullity. 1 Smith's Leading Cases, 1013, 6 Am. ed.; *Hess v. Cole*, 3 Zabriskie, 116; *Oakley v. Aspinwall*, 4 Comstock, 513; *Borden v. Fitch*, 15 Johnson, 146; *Wilson v. The Bank of Mount Pleasant*, 6 Leigh, 570; *Hollingsworth v. Barbour*, 4 Peters, 466; *Harris v. Hardeman*, 14 Howard, 334, 341; *Banning v. Taylor*. It will make no difference in the application of the principle that the proceedings were commenced by attaching specific goods or credits. The garnishee may from various motives omit to apprise the defendant, and it does not follow that the latter will receive the intelligence from any other source. It is quite enough, under such circumstances, to hold the judgment binding on the property attached, and the conclusion cannot be carried further or made the basis of a personal liability consistently with the doctrines of the Constitution and the common law. In like manner, notice to one of two or more partners may serve to found a judgment that will bind the partnership assets, because partners are agents for each other in all that concerns the common interest. To this extent the judgment should have faith and credit throughout the Union. But it will not impose a personal liability or obligation on a partner who does not appear, and is not served with process. *Meavin v. Kumbel*, 23 Wend. 293, 297.

A personal service in the sense of placing the writ in hands of the defendant, or reading it to him, may not be indispensably requisite; 1 Smith's Leading Cases, 1019, 6 Am. ed.; but a merely constructive notice by publication or attachment cannot rightfully be substituted for the direct and actual warning which every man ought to have before being condemned. If the Legislature were to authorize such a procedure, the statute would infringe the safeguards of the Constitution, and could not support the judgment. *Oakley v. Aspinwall*, 4 Comstock, 513; *Moulin v. Insurance Company*, 4 Zabriskie, 222, 242. A plea denying service or appearance is therefore presumably sufficient without averring that the defendant was not a citizen or resident of the State where the suit was instituted. *Rape v. Heaton*, 9 Wis. 328, 343.

Whatever the rule may be on this point, it is plain, that as every reasonable intendment is to be made in favor of the proceedings of the courts of justice, a defence on the ground of want of jurisdiction must be set forth with certainty and exactness. *Harrod v. Barretto*, 1 Hall, 155; *Gilman v. Lewis*, 4 Zabriskie, 246; *Shumway v. Stillman*, 4 Cowen, 292, 6 Wend. 447. A plea negating one means of notice, while leaving others open, is therefore necessarily insufficient. It will not, for instance, be enough to aver that the defendant was not served with process without alleging that he did not appear, or that he did not appear without averring that he was not served. *Harrod v. Barretto*. It was said, in like manner, in *Moulin v. The Insurance Company*, 4 Zabriskie, 222, 243, that jurisdiction may arise from the residence of a defendant, or the service of process upon him within the territorial limits of the court, or from the existence of the defendant as a body corporate under the laws of the State, or by such a body having property or a place of business in the State, or transacting business there, or by a voluntary appearance. The court accordingly overruled a plea denying that the defendants were citizens or residents of New York, or that they held their existence as a body corporate by virtue of its laws, or that process or other legal notice was served upon them, or upon any one duly authorized in their behalf, or that they appeared, pleaded, or made defence, but which did not deny that they had a place of business in the State, or transacted business there through the person on whom the service was effected. The averment that process was not served on any one duly authorized on their behalf, was held to fail for want of certainty. If it meant that no person was authorized to receive the service of process it was a denial of that which it was not necessary to prove. If it meant that the process was not served on any one authorized to transact business for the company, the averment should have been made in terms that could not be misunderstood.

In *McRae v. Mattoon*, 13 Pick. 53, Mattoon became bail for one Field in North Carolina, and soon afterwards left the State. Judgment was then obtained against the principal, and a *scire facias* issued to charge the bail, which was prosecuted through two returns of *nihil* to judgment. An action was then brought in Massachusetts on the latter judgment against Mattoon. He pleaded that he was not served, did not appear, and was not a resident or a citizen of North Carolina when the *scire facias* issued. The court entered judgment for the plaintiff, apparently on the ground that the defendant had, in becoming bail, agreed to be bound by the result of the proceedings against the principal.

To render a defence, on the ground of want of jurisdiction over the subject matter, valid, the plea must in like manner show specifically wherein the defect consists, and negative every reasonable intend-



ment going to sustain the judgment. *Hensely v. Force*, 7 English, 756. Such at least, would seem to be the more reasonable explanation of this decision, although the court appears to have thought that such a defence is confined to the original forum, and cannot be made collaterally in a subsequent proceeding. In *Davis v. Conelly's Ex'rs*, 4 B. Monroe, 136, the defendants who were sued in Kentucky on a judgment, which had been rendered in Ohio against them as executors, pleaded that the testator resided in the former State, that he had no assets in Ohio, and that they were never appointed, qualified or admitted there by any court. The plaintiff replied that suit was brought in Ohio against the testator in his lifetime, that the defendants appeared voluntarily as his executors after his decease, and that judgment was thereupon rendered against them in that capacity in due course of law. A demurrer to the replication was overruled, on the ground that the defendants were precluded from denying the character in which they had appeared and taken defence. The judgment bound them in their representative capacity, and was consequently binding on the estate. Where, however, the want of jurisdiction appears on the face of the proceedings, or they take place under a special power conferred by statute, and enough is not set forth to show that it was pursued, the defendant may take advantage of the defect by demurring, or on a plea of *nul tiel record*, without the aid of a special plea. *Folger v. The Ins. Co.*, 99 Mass. (ante, 633).

In declaring on the proceeding of a superior court, jurisdiction need not be alleged, and will be presumed until the contrary is shown. *Dunbar v. Hallowell*, 34 Illinois, 168 (ante, 632). When, however, the judgment of a tribunal of limited and inferior power is relied on as a defence or cause of action, it must be averred and proved that the authority of the court embraced the subject matter, and was so exercised as to bind the parties. *Best v. Smith*, 4 Texas, 365; *Snyder v. Snyder*, 25 Indiana, 399; *Thomas v. Robinson*, 3 Wend. 267. It follows that a declaration on the judgment of such a tribunal, will be bad unless it contains enough to show that the court had jurisdiction agreeably to the laws of the State whence the record comes, which in the absence of proof, may be supposed to be the same as those of the State where the suit is brought. *Snyder v. Snyder*. And in *Snyder v. Snyder*, the court held, that a recital that the writ was served by leaving it at the residence of the defendant, was insufficient in an action brought in Indiana on a judgment rendered by a justice of the peace in Ohio, without the aid of an allegation, that such a service was sufficient under the laws of the latter State. When, however, the jurisdiction of an inferior court of the same, or of another State, is once made to appear, the presumption in favor of the regularity of the proceedings, is as strong as

in the case of a superior court. *The State of Ohio v. Hunchman*, 3 Casey, 479; 1 Smith's Leading Cases, 992, 6 Am. ed.

It has been held that when a joint judgment fails as to one or more of the defendants for want of jurisdiction, a suit cannot be maintained upon it against others who appeared, or were served with process. *Hall v. Williams*, 6 Pick. 250; *Rangeley v. Webster*, 11 New Hampshire, 299. But in *Reed v. Pratt*, 2 Hill, 64, the Supreme Court of New York were of opinion that this rule only applies where the parties who did not appear in the former suit are included in the suit with those who did, and that the latter cannot resist an action brought solely against them, on the ground that the judgment is void as against other persons whom the plaintiff does not seek to charge.

An allegation that a judgment was procured through fraud is not a good common law defence to a suit brought upon it in the same or a sister State. *Christmas v. Russell*, 5 Wallace, 290; *Benton v. Burgot*, 10 S. & R. 240; *Granger v. Clarke*, 22 Maine, 128; *Anderson v. Anderson*, 8 Ohio, 108; *Homer v. Fish*, 1 Pickering, 135; *McRae v. Mattoon*, 15 Id. 137. The defendant must, under these circumstances, have recourse to chancery, unless the jurisdiction of the court where the point arises is sufficiently broad to permit an equitable defence to be made by plea. *Rogers v. Gwyn*, 21 Iowa, 370; *McRae v. Mattoon*; *Homer v. Fish*.

Any defence that could be made to a suit upon a judgment in the State where it was pronounced will, however, be equally good in a sister State, under the Constitution, and on general principles. *Rogers v. Gwin*, 21 Iowa, 370; *The State v. Helmer*, Ib. 376, and the question whether it should be presented through a plea in bar, or made the ground of an application to equity for an injunction, is one of procedure depending on the law of the forum. It is well settled that equity will enjoin proceedings instituted on the judgment of another State, if it is made to appear that the defendant lost the opportunity of making a good defence through the fraudulent representations of the plaintiff, and did not know of the injury in time to move for a new trial; *Pierce v. Olney*, 20 Conn.; *Hirshey v. Blackmar*, 20 Iowa, 161, 3 Leading Cases in Equity, 199, 6 Am. ed., and relief will be given in like manner where the allegation and proof are that the defendant was not served with notice, that the attorney who appeared for him acted without authority, and that the debt was not due. *The Bank v. Eldridge*, 28 Conn. 556. And the better opinion would seem to be that where equity is administered by the courts of law, such a defence may be set up by plea. *Rogers v. Gwin*, 21 Iowa, 370. In *Rogers v. Gwin*, it was accordingly held to be a good answer to a suit brought in Iowa, on a judgment rendered in Wisconsin, that the judgment had been obtained through the fraudulent assurances of the plaintiff's counsel,

that there was no cause of action, and the case would not be tried. And when a similar question arose in *Pierce v. Olney*, the court said that if such a defence could not be made, a judgment which would be unhesitatingly enjoined or set aside in the domestic forum, might be enforced under the Constitution in a sister State.

It has indeed been held, in numerous instances, that fraud is not a defence either to a judgment of another State or a domestic judgment. *Anderson v. Anderson*, 8 Ohio, 188; *Tarbox v. Hayes*, 6 Watts, 398; *Benton v. Burgot*, 10 S. & R. 240; *McRea v. Mattoon*, 13 Pick. 53. In applying these decisions, it is, however, necessary to distinguish between an allegation that the judgment was obtained fraudulently, and an allegation of fraud in the cause of action for which it was obtained. A defence on the latter ground is precluded by the adjudication, but the former may warrant an application to equity, or be a good equitable plea in a court of law. A denial of notice will not, however, bring the case within this principle, unless it also appears that the party could have made a defence if he had been warned in time. *Crawford v. White*, 17 Iowa, 560.

We have seen that after declaring that "full faith and credit shall be given to the public acts, records and judicial proceedings of other States," the Constitution provides that Congress "may prescribe the manner in which such acts, records and judicial proceedings shall be proved and the effect thereof." These words "and the effect thereof" may mean the effect of the proof in authenticating the act or record, or the effect of the act or record when authenticated.

According to one interpretation the constitutional provision is self-executing and operates directly, according to the other it requires the aid of legislation. If the former view is correct the judgments of other States are entitled to full faith and credit independently of the act of Congress, if the latter it is the act which determines their effect by declaring that they shall have such faith and credit as they have in the courts where they originated. The following passage, from Story's Commentaries, seems to indicate that the faith and credit due to the judgment are fixed by the Constitution, although the Legislature may provide the means of proof. In examining the power bestowed on Congress, the learned author says :

"But the clause does not stop here. The words added are 'and the effect thereof.' Upon the proper interpretation of these words, some diversity of opinion has been judicially expressed. Some learned judges have thought that the word 'thereof' had reference to the proof or authentication. Others have thought that it referred to the antecedent words, acts, records and proceedings. Those who were of opinion that the preceding section of the clause made judgments in one State conclusive in all others, naturally adopted the former opinion, for

otherwise the power to declare the effect would be wholly senseless, or Congress could possess the power to repeal or vary the full faith and credit given by that section. Those who were of opinion that such judgments were not conclusive, but only *prima facie* evidence, as naturally embraced the other opinion, and supposed that until Congress should by law declare what the effect of judgments should be, they remained only *prima facie* evidence. The former seems now to be considered the sounder interpretation." Story's Com., sects. 1306, 1307.

A somewhat different view was taken by Mr. Justice Wayne, delivering the opinion of the court in *McElmoyle v. Cohen*, under which the judicial proceedings of other States derive faith and credit from the Constitution, but Congress may provide that the judgment shall be merely a debt of record, or operate as a judicial obligation which cannot be discharged by local statute. "The authenticity of the judgment," said he, "and its effect, depend upon the law made in pursuance of the Constitution, the faith and credit due to it as the judicial proceeding of a State are given by the Constitution, independently of legislation" (ante).

The weight of authority, therefore, is that the faith and credit due to the judgments of other States are fixed by the Constitution, and do not stand in need of legislation. The opposite doctrine has, however, led, in some instances, to important consequences. For if the obligation is derived from Congress it will not exist in any case to which their legislation does not apply. The Act of 1789 directs that the judicial proceedings of other States shall be proved by the certificate of the clerk, authenticated by the signature of the judge. It has been held to follow, first, that the adjudications of justices of the peace and other magistrates, sitting in inferior tribunals, which do not record their proceedings formally through a clerk, are not within the act, either as it regards the means of authentication or their effect when proved, and remain *prima facie* evidence as at common law. The judgment of a justice of the peace must, consequently, be proved by the oath of witnesses who have compared the copy produced in evidence; *Robinson v. Prescott*, 4 New Hampshire, 455; *Maharin v. Bickford*, 6 Id. 567; *Thomas v. Robinson*, 3 Wend. 267; *Snyder v. Wyse*, 10 Barr, 157; *Warren v. Flagg*, 2 Pick. 448; and set forth enough to show jurisdiction of the cause, and the parties; *Warren v. Flagg*; *Robinson v. Prescott*; *Thomas v. Snyder*, 25 Indiana, 399; which will be determined by the law of the forum, unless the laws of the State where the judgment was pronounced are given in evidence. *Snyder v. Snyder*; *Thomas v. Robinson*.

A different and perhaps sounder view was taken in *Kean v. Rice*, 12 S. & R. 203, and the proceedings of an inferior tribunal, sitting in New

Jersey, proved by an examined copy and shown to be in accordance with the statutes of that State, as contained in a volume published by authority, held to be not only admissible in evidence, but entitled to full faith and credit, notwithstanding the objection that the means of authentication prescribed by Congress had not been used and were seemingly inapplicable.

It has also been decided that although the act of Congress requires the judgment to be authenticated both by the clerk and the judge, the same person may fill both offices and verify the attestation which he has signed as a clerk by a certificate in his judicial capacity. *Sally v. Gunter*, 13 Richardson, 72. And in *McKenny v. Gordon*, 13 Richardson, 40, a certificate from the clerk of a Court of Quarter Sessions, verified by the chairman of the board, was held to be in substantial accordance with the statute.

In *Morris v. Patchin*, 24 New York, 399, the attestation of a deputy clerk was, however, held to be insufficient to authenticate the judgment. The court said that the statute must be strictly followed, or if there is any State law or custom authorizing a different mode of authentication it must be proved. In making the certificate, the clerk derives his authority from the Federal and not from the State laws, and it has vitality and effect, not by reason of his official position under the laws of the State, but through the authority conferred upon him by the act of Congress. What the judge certifies to is that the forms in use in the State from which the record came have been observed. *Ferguson v. Harwood*, 7 Cranch, 408. This is essential because the forms of one State cannot be officially known to the courts of another. *Smith v. Blagge*, 1 John's Ca. 239.

We have seen that in *McElmoyle v. Cohen*, Wayne, J., held in opposition to the opinion which seems to have been entertained by Story, that Congress may by law define the effect of the judicial proceedings of other States, although the faith and credit due to them are placed beyond the reach of legislation. The effect of a judgment when considered in this sense is apparently the duration and force of the obligation as evidence, and the methods by which it may be carried into execution. The necessity for such a power in the national legislature is obvious, if we reflect that the legislatures of the several States might otherwise render the provisions of the Constitution ineffectual, by limiting the period during which an action could be brought on the record of another State to six months, or even to six days. The remedy depends on the *lex fori*, and although the States are forbidden to impair the obligation of contracts, this prohibition is retrospective, and will not prevent the passage of a law denying all redress for the breach of obligations incurred subsequently to its passage. If Congress possess such a power, it has not been exercised, and their legis-

lation does not go beyond the means of authenticating the judgment. The remedy is regulated by the States, and may, unless Congress intervene, be enlarged, curtailed, or limited at their discretion. A judgment has a twofold character; first, as evidence of the existence of the debt, and next, as affording the means by which it may be enforced. In the former it may have an extra-territorial operation, and bind the parties wherever they are found, in the latter it is confined to the court where it was pronounced. As evidence, the judgments of other States are regulated by the Constitution, as a remedy, they depend on the local law. *Ableman v. Booth*, 21 Howard, 506. How long the obligation of a judgment shall endure, to what extent it shall be a lien, whether it shall have priority over other debts, and how it shall be executed, are questions governed by the laws of the forum, which may, in the course of legislation, put debts of record on the same level with debts due by simple contract, or even postpone them to the latter.

In the distribution of the assets of an insolvent estate or debtor, debts due for personal services, or contracted during a last illness, accordingly, have a preference in Pennsylvania and some of the other States, over judgments, whether foreign or domestic. Such a statute simply regulates the remedy without impairing the faith and credit secured by the Constitution. *Brengle v. McClellan*, 7 Gill, 474; *Harness v. Green*, 20 Missouri, 316. The law was so held in *Cameron v. Wurtz*, 4 McCord, 278, in a case growing out of the administration of assets of a debtor after his decease. Similar decisions may be found in *Brengle v. McClellan*, and *Harness v. Green*; and in *McElmoyle v. Cohen*, the Supreme Court of the United States held that there was nothing unconstitutional in a law of the State of Georgia raising debts due by simple contract to an equality with the judgments of other States.

It results from the same doctrine that a law limiting the period within which an action may be brought upon the judgment of another State, is a regulation of the remedy which does not touch the faith and credit of the judgment, nor impair the obligation of it as a contract, if a reasonable time is left within which it may be enforced. It is not, therefore, contrary to the Constitution of the United States. The rule was laid down in *McElmoyle v. Cohen* (ante, 608), and is confirmed by the subsequent course of decision. *The Bank v. Dalton*, 9 Howard, 522; *Brown v. Howard*, 20 Id. 22. Sixty days is not necessarily too short a period according to *Bacon v. Howard*; and in *The Bank v. Dalton*, the court held that a statute requiring the suit to be brought within two years, might be taken advantage of by a defendant who moved into the State after the period of limitation had expired, presumably for the sake of evading the obligation of the judgment.

Although the judgments of other States may thus be brought down to the level of simple contracts as it regards priority, or the time within

which they may be enforced by suit, they are not the less obligations of record, and entitled as such to precedence at common law in the distribution of assets. They consequently do not fall within the provisions of a legislative enactment, limiting the right of action on debts generally, without specifying judgments; *Napier v. Gidiere*, 1 Speer Eq. 214, and will take the same rank with domestic judgments when the funds of an insolvent estate are in the hands of an administrator for distribution, unless the order of payment is changed by statute. *Colt's Estate*, 4 W. & S. 314. "The original course of action here," said the court in *Napier v. Gidiere*, "was contract, but it is no longer so, it has passed into a judgment, and that is the foundation of the action, and therefore not embraced in our statute; whatever may have been the original cause of action, it is merged in the judgment, as effectually so, as if a bond or other specialty had been given for a simple contract debt. It has assumed a new form and a name not found in the statute."

It is equally well settled, as indeed this language shows, that a judgment operates as a merger, not only in the State where it was rendered, but throughout the Union, and precludes a resort to the original demand either as a defence or cause of action.

This results from the well established doctrine of the common law, that when a debt or liability of any sort receives a judicial determination, it is absorbed in the higher obligation created by the adjudication, which was extended by the Constitution to the judgments of other States. The plaintiff must, therefore, in order to avoid a failure on the ground of variance, set the judgment forth and rely upon it as the foundation of the suit; *Adams v. Montgomery*, 19 Johnson, 162; *The Boston India Rubber Co. v. Hart*, 14 Vermont, 92; while the judgment will conversely be a bar to a suit on the original cause of action. *Baxley v. Linah*, 4 Harris, 241; *Candee v. Scribner*, 2 Michigan, 255 (ante, 618). But for this rule the plaintiffs might recover a larger sum in the second suit than the first, or fail in the one after succeeding in the other; and the anomalous spectacle would be presented of two irreconcilable adjudications touching the same subject matter. The law was so held in *Baxley v. Linah*, and a judgment in Maryland said to be a good defence to a foreign attachment founded on the same cause of action in Pennsylvania, although the attachment was prior not only to the judgment but to the suit in which it was pronounced; and the point is well established under the general course of decision. *The Bank of the U. S. v. The Merchants' Bank*, 7 Gill, 415, and *The North Bank v. Brown*, 50 Maine, 214. Obviously this doctrine may, where the debtor is insolvent, hinder the creditor and occasion the loss of the debt, but the court said that this did not vary the principle or authorize two judgments for the same cause.

The rule is however derived from the Constitution and not from the common law, under which the proceedings of a foreign court were merely evidence, and did not preclude the right to consider the subject on independent grounds. And as the provisions of the Constitution do not apply until judgment is pronounced, the pendency of a suit cannot be pleaded in abatement to an action for the same cause in another State. *Lowry v. Hall*, 2 W. & S. 133; *Hatch v. Spafford*, 22 Conn. 485; *Cook v. Litchfield*, 5 Sandford, 330; *McJilton v. Lowe*, 13 Ills. 486; *Seevers v. Clement*, 28 Maryland, 426; *Smith v. Lathrop*, 44 Penna. 326; *White v. Whitman*, 1 Curtis, 494; *Williams v. Ayrault*, 31 Barb. 364. This is true of all jurisdictions which are foreign to each other, and therefore of the courts of the several States.

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ABANDONMENT.

MARSHALL v. THE DELAWARE INSURANCE COMPANY.

Circuit Court of the United States.

APRIL TERM, 1807.

[REPORTED, 2 WASHINGTON, 54-60.]

*The vessel and cargo insured were captured as prize, libelled and acquitted on the 7th of July; and on appeal by the captors, the sentence was affirmed on the 9th of July; and restitution was decreed; and on the 19th of July, restitution of the property captured was actually made, except of that which had been pillaged by the captors; but at what hour of the day the same was made, was submitted to the court. On the same day, a survey was made to ascertain the amount of the spoiliations of the cargo, and on the 30th of July the vessel proceeded on her voyage.*

*On the 17th of July (in New York), the plaintiff received notice of the capture. On the 18th, he directed his agent in Philadelphia to abandon, who did so on the 19th, informing the plaintiff thereof by mail; the mail leaving Philadelphia for New York, at twelve o'clock on the 19th of July.*

*The actual state of the loss, at the time of the abandonment, ought to decide the right of the assured to make the loss a total one; and it is*



*on the reality of the loss at the time of the abandonment, its legality depends.*

*The right to abandon did not depend, in this case, on the question, whether the restitution was actually made, and the property in possession of the master of the vessel. The property was in the actual possession of the master, after the decree and warrant of restitution delivered to the master.*

*In case of capture and recapture, the property remains with the recaptors until salvage is paid.*

ON a case stated, the plaintiff, a citizen of the State of New York, and residing in the city of New York, by his agent, on the 7th of May, 1806, caused insurance to be made on the cargo, freight, and Brig Rolla, all owned by him; S. Clapp, master, at and from St. Jago de Cuba. The policy on the freight, and part of the cargo, valued; on the vessel, and residue of cargo, open.

On the 28th of May, 1806, the vessel while proceeding on her voyage, was captured and taken possession of as a prize, by the French privateer schooner Napoleon, and carried into Lemon, an outport of Samana. The captors there committed great pillage of the cargo. The Rolla remained at Lemon four or five days, and was then carried to Samana, under the charge of a prize master, where further pillage was committed. The captors libelled the vessel and cargo, in the inferior tribunal at the city of St. Domingo; and both were acquitted on the 7th of July. This decision was appealed from, by the captors, to the superior tribunal, at the same place; when the said vessel and cargo were again acquitted, and restitution awarded. On the 9th of July, restitution of the brig was ordered to be made to the captain, with what remained of her cargo.

On the 19th of July, 1806, restitution was actually made; but, if the court should think there is a collision in the evidence as to the hour or time of actually delivering possession, and the time shall appear to them material, the court are requested to fix the hour or time according to their opinion of the credit and weight of the evidence. The captain had a survey made on the same day, to ascertain the loss and damage from pillage, &c.; and on the 30th of July, he proceeded on his originally intended voyage to St. Jago de Cuba; where he arrived on the 6th of August, and where the remainder of the cargo was sold, and a part of the proceeds invested in a return cargo, which was sent by the Rolla, under the

command of the mate, to New York; and the rest of the proceeds were invested in bark, and brought home in the *Jane* by the captain.

The return cargo arrived at New York, on the 15th of October, 1806; and on the following day, the plaintiff wrote to his agent in Philadelphia, informing him thereof, and directing him to give the information to the insurers, which was accordingly done; but the insurers refused to have anything to do with the property, or to give any direction as to the disposal of it. The plaintiffs then sold the said property, for the account of the underwriters, but without their assent; except some bark, which yet remains unsold.

Intelligence of the capture was received at New York by the plaintiff, on the 17th of July, 1806. He wrote on the 18th to his agent, directing him to abandon the freight, vessel, and cargo to the insurers; which letter was received at Philadelphia, by the agent, on the morning of the 19th; and an abandonment was made to the insurers on the morning of the 19th; of which abandonment the said agent informed the plaintiff by a letter, which was forwarded to New York by the mail of the said 19th of July, which was closed at Philadelphia at twelve o'clock of the same day.

The question for the opinion of the court is, whether the plaintiff is entitled to recover for a total, or a partial loss?

*Ingersoll* and *Hopkinson*, for the plaintiff, contended, first, that if a loss happen by capture, of which the plaintiff is informed, and he offers to abandon, not knowing that the property had been acquitted and restored, though the fact be so, before the offer made; the abandonment is good to authorize the insured to go for a total loss. The loss happened here by capture and detention. Second, that, upon the evidence, the restitution was not complete till one o'clock in the afternoon, whereas the abandonment must have been before twelve o'clock. As to the doctrine that there are no fractions of a day, it does not apply where priority of time as to two facts, becomes important. 1 *Ld. Ray.* 281. *Idem*, 1568. 3 *Burr.* 1433.

*Rawle* and *Dallas*, for defendants, denied both propositions. They cited 1 *Esp. Rep.* 237, to show, that even after a capture, condemnation, and sale, and the vessel purchased by the captain

for his owners, that the insured could not abandon; the captain being the agent of the owners in the purchase. They relied on the expressions of the Supreme Court, in *Rhineland v. The Insurance Company of Pennsylvania*; and of the Supreme Court of Pennsylvania, in *Dutilgh and Gatliff*; and of Lord Mansfield, in *Hamilton v. Mendez*; to prove that the fact of the loss continuing to the time of the abandonment, and not the information, fixes the right of the insured to abandon. Also the case of *Peyton v. Hallett*, 1 *Caine's New York Rep.* 363, in which the case has been directly decided. They also cited *Park*, 75, 161.

WASHINGTON, J. The question whether if a right to abandon once exist, the subsequent release or safety of the property before the abandonment, but the fact unknown to the insured, will defeat that right, has never been directly decided, that we know of, but in the case of *Peyton and Hallett*.

The reasoning of the case would seem to show, that the state of the loss at the time of the abandonment, ought to decide the right of the insured to make the loss a total one, and thus to throw the property upon the underwriters; and to demand from them the sum insured. The foundation of the right is the loss of the property, really or technically; and the transfer of what may be saved to the underwriter, is predicated upon the reality of the loss. But if the property be in safety, how can the underwriter, under the terms of his contract, be called upon for an indemnity; which was only promised in case of loss, and when no injury, or such as is merely partial, has been sustained? The information received by the insured may have been correct when it was given, but it cannot make the fact otherwise than it really is, at the time when the claim is made for a total loss.

Although there is no case but the one before mentioned, precisely in point, yet there are some which seem to throw considerable light upon the subject; and we think enough may be gathered from what was said by Lord Mansfield in *Hamilton v. Mendez*, to show his opinion respecting it. In that case, the vessel, which had been captured and recaptured, was brought into Portsmouth before the offer to abandon. It is not stated, that at the time of the offer the arrival of the vessel was known to the insured, though the fact is strongly to be inferred. But it is clear, that if such was the fact it does not enter into the reasoning of the judge, who, when he lays down the principles of the law, uses expres-

sions and illustrations which seem strongly to exclude that circumstance from the consideration which he took of the subject. His lordship observes, that this action, which is brought for an indemnity, must be founded on the nature of the damnification, *as it really is at the time* of the action brought, or, at most, at the time of the offer to abandon. He considers it absurd to recover as for a total loss, when *the final event* proves that there was no loss at all, or only a partial one. He seems to fix the time of bringing the action, as that at which the rights of the parties are to be decided; and then lays it down, that if the *cause of action* does not subsist at the time, its having existed at any previous time will not avail. In no part of this opinion does he appear to consider the right of the insured to go for a total loss, to depend upon the circumstance of information he had received of the situation of the property at the time of the offer to abandon, or at that of the action brought; and the cases which he cites as analogous to, and illustrative of the doctrine he is endeavoring to establish, affords strong ground for believing that he altogether relied upon the loss *continuing to the time of the abandonment* and bringing the action (and so he also expresses himself in another part of the same case); and not upon the information to the insured of the safety of the property. For certainly it cannot be contended, that in answer to a plea of the tenant, in an action of waste, that he had repaired before the action brought; or to that of the principal to an action of the surety for an indemnity, that he had paid the debt; the plaintiff could reply, that at the time of bringing the action, he had not notice of the fact set out in the plea. And I think it is impossible to produce a case upon any other subject, where the rights of the parties could be made to depend upon anything, but the real facts at the time when these rights accrued. Why should there exist an exception in cases of insurance? That Park has deduced the same conclusion which this court does from the expressions of Lord Mansfield, in this and other cases, is very obvious. He says, that "the loss must continue total at the time when the offer to abandon is made, or the action brought." Park, 145. The case of *Hallett v. Peyton*, in the highest court of judicature in the State of New York, which appears to have been very fully argued and considered by the court, is in point. The expressions used by the Supreme Court of the United States, and the Supreme Court of this State, in the cases cited are very strong, though like those of Lord Mansfield,

in *Hamilton v. Mendez*, they are obiter dicta. Upon the whole, then, relying upon these authorities, and the reasons which support them; and considering that they stand unopposed by any case whatever, we feel ourselves warranted in deciding this point in favor of the defendants.

The next question is, whether at the time when the offer to abandon was made, the vessel was, in point of fact, in possession of the insured? I say, *in his possession*, because these are the terms which the counsel, in argument, appeared to consider as proper. But we wish it to be considered, that this court does not mean to decide that actual possession was not necessary after the decree and warrant of restitution delivered to the officer. It may, perhaps, become a question, whether, if the property be in safety, by the acquittal and warrant to execute it, this circumstance may not be sufficient to defeat the right of abandonment. In the cases of capture and recapture, the property remains with the recaptors till the salvage is paid: and in the case of *Hamilton v. Mendez*, the possession of the recaptors continued after the offer to abandon.

As to the fact, we think it very immaterial, whether the possession was delivered before or after the examination made of the state of the cargo, for it is obvious to any person who looks at the proces verbal, that it must have taken more than double the time to write this warrant, than was consumed in obtaining a knowledge of the facts which it recorded; consequently, if it began at nine in the morning, and the proces verbal was concluded at one in the afternoon, the facts, of which it is a history, must have taken place and been completed long before meridian.

But we do not mean to decide so important a point upon evidence which may be founded in conjecture. For we hesitate not to declare, that if for want of clear proof, the act of abandonment and restitution must be considered as cotemporaneous, the decision ought to be in favor of the defendants, for two reasons—first, that the inclination of judges is not to extend the right of abandonment, for the purpose of converting a partial into a total loss, beyond the point to which former decisions have gone, because such a right is not warranted by the contract of the parties; and secondly, because the insured ought not only to prove the loss, but the continuance of it to the time of the abandonment; and if the evidence is not sufficient for these purposes, he must fail. Upon the whole, we are of opinion that the plaintiff is only entitled to recover for a partial loss.

## MARSHALL v. THE DELAWARE INSURANCE COMPANY.

In the Supreme Court of the United States.

FEBRUARY, 1808.

[REPORTED, 4 CRANCH, 202-208.]

*The right of the insured to abandon and recover for a total loss, depends upon the state of the fact at the time of the offer to abandon, and not upon the state of the information received.*

*The technical total loss arising from capture ceases with a final decree of restitution, although that decree may not have been executed at the time of the offer to abandon.*

ERROR to the Circuit Court for the District of Pennsylvania, in an action for a total loss, on a policy of insurance on the Brig Rolla, her cargo and freight.

The material facts stated, were, that the Brig Rolla, a neutral vessel, while pursuing the voyage insured, was captured by a belligerent cruiser, and libelled as a prize of war. On the 9th of July, 1806, a final sentence in favor of the vessel and cargo was passed, and on the 19th of the same month, about 1 o'clock p. m., restitution was made. On the 17th of July the assured in New York received information of the capture, and immediately gave orders to his agent in Philadelphia, to abandon to the underwriters. In pursuance of these orders the offer to abandon was made on the morning of the 19th.

*Hopkinson*, for plaintiff.

The question in this case is, whether the plaintiff is entitled to recover for a *total*, or only for a *partial* loss.

The proceeds of the cargo have been received by the plaintiff, who sold the same for account of the underwriters if they will receive them.

If the abandonment was made before the restoration in fact of the cargo to the captain on the 19th of July, the plaintiff has a right to recover for a total loss, according to the decision in *Rhine-lander's Case*, at the last term (*ante*, p. 41).

The plaintiff having shown a total loss, by the capture, it is incumbent on the defendant to show that the property was restored

before the abandonment. On the 17th the plaintiff received information of the capture; on the 18th he wrote and put into the post office at New York, the letter to his agent in Philadelphia, directing the abandonment to be made; on the 19th it was received in Philadelphia, and the abandonment offered. The abandonment must relate to the 18th, when the plaintiff wrote his letter and made his election to abandon. Abandonment is an *ex parte* act, and if the plaintiff has a right to abandon at the time when he elects and offers to abandon, the defendants are liable from that time. No consent is necessary on the part of the defendants. The plaintiff was bound from the date of his letter; and the defendants must be equally bound.

But although the property may have been in fact restored before the abandonment, if that restoration was unknown to the plaintiff, it is yet an undecided question, whether the abandonment is not valid.

The opinion of Lord Mansfield in *Hamilton v. Mendez*, unlike the opinions of that great man, is confused and contradictory, sometimes making the question of right to abandon depend upon the state of the information, and sometimes on the fact itself.

It is not reasonable that the insured should be bound to abandon upon receipt of the first intelligence, and yet the underwriter be permitted to take advantage of subsequent events. There would be no mutuality in this principle. It would be ruinous to merchants thus to be kept out of their money. Besides the contract is for indemnity, and there can be no fairer mode of ascertaining the indemnity, than to give the underwriters the thing itself, subject to the chance of recovery, and let them pay the price. If the thing is restored and goes to a good market, the underwriters derive the benefit; if a loss happens, it is what they are bound by their contract to sustain. But as to the state of the fact itself, we contend that there was no actual restoration of the property before the offer to abandon. If there was, it is for them to show it. The *onus probandi* is on them.

If it is necessary to the justice of the case, the court will divide the day, and ascertain which event did first actually happen. 3 Burrow, 1434. *Combe v. Pitt*.

*Dallas* and *Rawle*, contra, contended,

That the peril being at an end, at the time of the offer to abandon, the plaintiff cannot recover for a total loss, unless the conse-

quences of the capture created a total loss either in fact or in law.

The peril by capture was at an end on the 9th of July, when the final decree of restitution was pronounced in the court of dernier resort.

The right to restitution was consummated, and the authority to restore absolute. What remained was mere matter of form. The vessel and cargo were in the hands of the public officer, who held the same, after the decree, in trust for the owner. There was no longer any hostile or adverse possession. The property was in no danger of condemnation, or even of further detention.

The state of the *fact*, and not of the *information*, is the test of the right to abandon. If intelligence were the test, any idle, vague rumor might compel the underwriters to pay a total loss, when the property was in fact in perfect safety the whole time.

The contract is, that the property shall not *perish* by the peril, not that it shall not *encounter* the peril. A storm may injure it, but if the injury does not exceed half the value, and the voyage be not broken up, it is not a total loss. The underwriters are only bound to pay the partial loss. It is a contract of indemnity only; the liability of the defendants, therefore, must depend on the state of the fact, and not of the intelligence. Park, 77, 144, 145, 146, 148, 152, 155, 156, 160, 167. Esp. Ca. N. P. 237, *McMasters v. Shoolbred*, *Rhineland v. Ins. Co. Pennsylvania* (ante, p. 41); *Dutilgh v. Gatliff*, cited in *Rhineland's Case*; 1 N. Y. Cases in Error, 21, 22; 1 Johnson, 205.

It is not contended that the consequences of the capture created a total loss, either in fact or in law. The expense, pillage, and damage did not amount to more than one-fourth of the insured value, and these the underwriters are willing to pay. The vessel arrived at her destined port. She performed the voyage insured.

*Ingersoll*, in reply.

It is said that the restitution is to be considered as referring back to the time of the decree; but that point was otherwise decided in the case of *Dutilgh v. Gatliff*, in the Supreme Court of Pennsylvania. It was there decided, that although at the time of the offer to abandon, there was a decree of restitution, yet as that decree was not known to the party who offered to abandon, and as in fact the property was then in possession of the captors, the insured had a right to recover for a total loss.



*February 23.*

MARSHALL, C. J., after stating the facts of the case as above, delivered the opinion of the court as follows:

The question submitted to the consideration of the court is this: Is the assured entitled to recover for a partial, or for a total loss?

In support of the claim for a total loss, two points have been made.

1st. That the state of information at the time of the abandonment, not the state of the fact, must decide the right of the assured to abandon.

If this be otherwise, then, it is contended

2d. That the right to abandon is coextensive with the detention, which continued until restitution was made in fact, and that restitution in fact, though made on the same day, was posterior in point of time to the abandonment.

1. Does the right to abandon depend on the fact, or on the information of the parties?

The right to abandon is founded on an actual or legal total loss. It appears to the court to consist with the nature of the contract, which is truly stated to be a contract of indemnity, that the real state of the loss at the time the abandonment is made, is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of information, a seizure which scarcely interrupted the voyage might be, and frequently would be converted into a total loss, and the contests respecting the real state of information might be endless. Intelligence of capture and of restitution might be received at the same time, and the insured might suppress the one, and act upon the other.

This point came under the consideration of the court in the case of *Rhineland v. The Insurance Company of Pennsylvania*, in which case it was said that "where a belligerent has taken full possession of a vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss." The court, in delivering this opinion, understood itself to require, that the continuance of the possession up to the time of the abandonment, or a technical total loss incurred, notwithstanding the restoration, was necessary to justify a recovery for a total loss.

In considering the second point, the court proceeded to inquire whether the technical total loss on which the right to abandon

determined, was terminated by the decree of restitution, or continued until that decree was carried into execution, and restitution was made in fact.

The real object of the policy is not to effect a change in property, but to indemnify the insured. Whenever, therefore, only a partial loss is sustained by one of the perils insured against, the original owner of the property retains it, prosecutes his voyage, and recovers for his partial loss.

But the voyage may be really broken up, without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage. This is a peril insured against, and of its continuance no certain estimate can be made. In the case of capture, it is, for the time, a total loss, and no person can confidently say, that the loss will not finally be total. So of an embargo. Its duration cannot be measured, and it may destroy the object of the voyage. These detentions, therefore, are, for the time, total losses, and they furnish reasonable ground for the apprehension that their continuance may be of such duration as to break up the voyage, or ruin the assured, by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment, and a recovery for a total loss.

But when a final decree of restitution, from which it is admitted that no appeal lies, has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue, as from that time to break up the voyage. There is no reason to presume a subsequent detention on the part of the foreign prince. There is no motive for such detention. The master of the captured vessel may perhaps not be ready to receive possession, and the delay may proceed from him. At any rate, without some evidence that the peril was not actually determined, the court cannot consider it as continuing after the sentence was pronounced. A technical total loss originates in the danger of a real total loss. The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had pronounced the sentence, or by the sovereign of the captor.

Had the facts on which this question depends been known at New York and Philadelphia as they occurred, could it have been

said that there existed a technical total loss? After a decree of restitution, could it be said that while means were taken to carry that decree into execution, while the mandate for restitution was passing from the court to the vessel, the assured had a right to elect to consider his vessel as lost, and to abandon to the underwriters? To this court, it seems that the right to make such an election at such a time, would be inconsistent with the spirit of the contract, and that the technical total loss was determined by the decree of restitution, unless something subsequent to that decree could be shown to prove the continuance of the danger, or of an adversary detention.

Nothing in this opinion is intended to extend to the case where a cargo may be lost, without the loss of the vessel.

There is no error in the judgment of the Circuit Court of Pennsylvania, and it is to be affirmed with costs.

Judgment affirmed.

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Were it possible to know the ultimate consequences of a marine disaster when it happens, or to wait until they are fully disclosed, there would be little difficulty in ascertaining the amount of the injury sustained by the insured, or the compensation due by the insurer, and thus adjusting the rights and duties of both parties on their true basis; Emerigon, *Traite des Assurances*, chap. xvii., sect. 1. But while the purpose of the contract, which is indemnity, requires that the recovery should be measured by the loss, it would obviously be defeated by the interposition of an unreasonable or prolonged delay, in the search after absolute or theoretic truth. Conventional rules and arbitrary presumptions, have therefore been substituted for the absolute accuracy of proof, which could not be attained without causing a delay, that might be equivalent to a denial of justice. Emerigon, chap. xvii., sect. 2, §6. The right of abandonment, must frequently be exercised before the extent of the injury is known, and while the final result is uncertain. It may be necessary, under these circumstances, to determine whether the criterion is to be found in the supposed, or actual, the present, or ultimate condition of the property at risk. The question is a complicated one requiring a preliminary explanation.

A marine insurance is in substance, and with some restrictions—which need not be considered here—a stipulation that the insured shall not be deprived of the possession, or prevented from making the appropriate use of the subject matter of the contract, by the risks for

which the insurers have agreed to be answerable; and a breach of this engagement may be a total loss within the meaning of the policy although the property exists in specie, and may, in the course of events, be freed from the peril in which it is involved. *Peele v. The Merchants' Insurance Company*, 3 Mason, 27, 40, 65; *Symonds v. The Union Insurance Company*, 4 Dallas, 417; *Rhineland v. The Insurance Company of Pennsylvania*, 4 Cranch, 29; Emerigon, *Traité des Assurances*, chap. xvii., sect. 2, § 6; *Thuring v. The Washington Insurance Company*, 10 Gray, 443.

"There are," said Marshall, C. J., in *Rhineland v. The Insurance Company of Pennsylvania*, "situations in which the delay of the voyage, and the deprivation of the right to conduct it, produce inconveniences to the insured, for the calculation of which the law affords and can afford no standard. In such cases there is, for the time, a total loss; and in this state of things the insured may abandon to the underwriter, who stands in his place, and to whom justice is done, by enabling him to receive all that the insured might receive." And a similar rule was laid down by Story, J., in *Peele v. The Merchants' Insurance Company*, in the following language: "If there be any general principle that pervades and governs the cases, it would seem to be this, that the right to abandon exists, whenever, from the circumstances of the case, the ship—for all the useful purposes of a ship for the voyage—is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage, is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist, for the purposes of utility, and therefore, subjects her to be treated as lost." And he went on to say, that the right of abandonment "is admitted to exist when there is a forcible dispossession, or an *ouster* of the owner of the ship, as in the case of capture; when there is a restraint or detention which deprives the owner of the free use of his ship, as in the case of embargoes, blockades, and arrests; when there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in port where the disaster happens; when the injury is so extensive, that by reason of it the ship is useless, and making repairs would exceed her value." In 2 Arnould on Insurance, sect. 383, p. 1071, this is said to be the best and most comprehensive summary of the causes justifying an abandonment.

It is, however, equally well settled, that the insured must, in order to take advantage of this privilege, give a notice of abandonment immediately on hearing of the loss, or within such a reasonable time afterwards, as will enable the insurers to take measures for the safety of

the property which is thrown on their hands. *The Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268. And it seems to have been held, at one period, that if the information actually received justified the abandonment, it would not be defeated by the subsequent arrival of intelligence, showing that the first report was without foundation, or had ceased to be true before the abandonment took place. It was said to be absurd and inconsistent, "to hold that the insured is bound to make his election to-day, and is absolutely concluded, by his offer to abandon; and yet, that the insurer may wait six months, as would be the case in an India voyage, to decide by future intelligence, whether he is bound to accept the cession which has been made to him." *Dorr v. The New England Mutual Insurance Company*, 4 Mass. 224, 230. One difficulty in the way of this argument would seem to be, that it proves too much, and would lead to the conclusion, that when the intelligence received by the insured warrants an abandonment, it should be held valid, whether the statements made to him were designedly false, or had merely ceased to be true. *Bainbridge v. Neilson*, 10 East, 341. Nor can it be said, that the necessary effect of testing the right to abandon by existing circumstances, is to shut one party out from the power of retraction, while leaving the other free to choose the course which may subsequently prove most for his own interest; for although an abandonment operates as a grant, and cannot be withdrawn without the consent of the insurers; *King v. The Middletown Insurance Company*, 1 Conn. 302; still a cession made under a false or erroneous impression, and which is not justified by the real state of the case, may be recalled at any time before the acceptance, which will make it mutually binding. *The Columbian Insurance Company v. Ashby*, 4 Peters, 139, 145; Emerigon, chap. xvii., sect. 6, § 5.

The doctrine that a cession warranted by the information actually received, ought not to fail in consequence of events that could not be known at the time, which will be found defended with great ability, in the pages of Emerigon, chap. xii., sect. 22, chap. xvii., sects. 2, 4, was opposed by Pothier and Valin; Valin, Liv. 3, tit. 6, art. 45; and finally overthrown in England, in *Hamilton v. Mendes*, 2 Burr. 1198, by Lord Mansfield, who overruled the argument, that the right which accrues on the capture of a vessel cannot be divested by her release, and said that to authorize a recovery for a total loss, it must not only be total at the time of abandoning, but down to that of action brought.

Notwithstanding the doubt expressed by Lord Eldon in *Smith v. Robertson*, 2 Dow, 470, this decision is still the rule in England, where an abandonment, valid at the time, may be defeated by the subsequent arrival of the cargo or restoration of the vessel.

The courts of this country fluctuated in their views, and finally reached a different conclusion from that which had been attained in

England. It was held in New York, that where the insured acts on information, which was true when sent and warrants an abandonment, a vested right accrues on either side, which will not fail because it is subsequently ascertained that a change had occurred during the interval. *Munford v. Church*, 1 Johnson's Cases, 147; *Murray v. The United States Insurance Company*, 2 Id. 263; *Livingston v. Hastie*, 3 Id. 293. In *Dorr v. The New England Mutual Insurance Company*, 4 Massachusetts, 224, the court obviously leaned in the same direction, and towards testing the right of abandonment by the knowledge of the insured, and not by the condition of the property at the time when the abandonment is made. But these cases were expressly or impliedly overruled in *Hallett v. Peyton*, 1 Caine's Cases, 28, and *Church v. Bedient*, Ib. 22; and the right of abandonment said to depend on the actual state of things, and not on the information received by the insured. If the loss was not total at the time, it mattered not that it had that character at an antecedent period, and lost it in consequence of a change that was not known till afterwards. It was accordingly held, that a captured vessel could not be abandoned after she had been liberated, although the owner had been informed of the detention, and was ignorant that it has ceased. The question whether the right of abandonment depends on the actual or supposed condition of the property at risk, arose not long afterwards in the principal case, and was decided in favor of the former alternative. Chief Justice Marshall said, that under a contract of indemnity there was no safe criterion but the actual loss. To make the right depend on the information of the parties, would involve litigation and might lead to fraud. If intelligence of capture and of restitution arrived by the same mail, the insured might suppress the one, and act upon the other.

The rule established by this decision prevails throughout the Union. *De Peau v. Russell*, 1 Brevard, 439; *Bradlie v. The Maryland Ins. Co.* 12 Peters, 378; *Humphreys v. The Union Insurance Company*, 3 Mason, 435; *Adams v. The Delaware Insurance Company*, 3 Binney, 287; *Penney v. The New York Insurance Company*, 3 Caines, 155; *Schieffelin v. The New York Insurance Company*, 9 Johnson, 26; *Clarkson v. The Phoenix Insurance Company*, Ib. 1; *Fontaine v. The Phoenix Insurance Company*, 11 Id. 293; *Dickey v. The New York Insurance Company*, 4 Cowen, 222; 3 Wend. 656; *Depau v. The Ocean Insurance Company*, 5 Cowen, 63; *The Cincinnati Insurance Company v. Bakewell*, 4 B. Monroe, 541. "If," said Tilghman, C. J., in *Adams v. The Delaware Insurance Company*, "we consider the final event in this case, there was in fact but a partial loss. The vessel and cargo were captured by the French, and carried into port; they were acquitted by the Court of Admiralty judging of matters of prize in the first instance; the captors appealed, and the decree of acquittal

was affirmed by the court of the last resort; in consequence of which, the vessel and cargo were restored, and the voyage on which the insurance was made, was completed. But there was at one period, a total loss by capture, and an abandonment by the plaintiff, at a time when he supposed that such total loss continued. This abandonment was made after the final acquittal and order for restitution, but before restitution actually took place. The plaintiff's counsel seemed to consider it as a doubtful point, whether it was not sufficient to recover for a total loss, if the abandonment after capture was made at a time when the plaintiff *supposed*, from the information received, that a total loss existed, although in *fact* it had ceased to exist, by an actual restitution. Considering the decisions which have taken place in the Supreme Court of the United States, and the courts of several of the States, and the strong reason on which those decisions are founded, I look upon that point as at rest. It is the *actual*, and not the *supposed* state of things at the time of the abandonment, that must govern the case. There is nothing in the nature of the contract, from which it may be inferred that the rights of the parties are to depend upon *supposed losses*. When the assured hears of a loss, if he means to claim for a total loss, he should give speedy notice of his intention to abandon. But whether or not there be at that time a total loss, is a fact to be proved. To say that the total loss exists, because you have been so informed, is bad reasoning. To say that it exists *then*, because it existed *some time before*, is begging the question. Capture and adverse detention, while they continue, are considered in *law* as a total loss; but in their *nature* they certainly are not so, because there is a chance of recapture or restitution. It appears to me, that the right of abandonment on these artificial or technical losses, may be carried so far as to produce mischief. It tends to divert the contract of insurance from its original intent, which was the indemnification of the assured in case of loss. It often creates an anxiety in the assured not to pursue the voyage, but to throw it upon the underwriters, and may lead to improper practices."

It follows from this principle, that the right of abandonment which arises on the sinking of a vessel, or where she is deserted at sea by her crew, will cease if she be subsequently raised or brought into port, although by salvors acting without the knowledge or consent of the owners. *Kemp v. Halliday*, 1 L. R., Q. B. 520; *Thomas v. The Rockland Ins. Company*, 45 Maine, 116. In like manner a final award or decree of restitution will put an end to the right of abandonment, although the vessel does not come to the actual possession of the owners until afterwards (ante, 674). The principal case was followed on this point in *Adams v. The Delaware Ins. Co.*, 3 Binney, 287. A decree that may be appealed from will not, however, produce this effect until an

order of restitution is delivered to the master, or the ship is in some other way placed at his control and disposition. *Dutilh v. Galtiff*, 4 Dallas, 446. And so where the vessel was released on giving a bond conditioned for the payment of her full value if condemned, it was held not to be such a restoration of the property as would preclude a recovery for a total loss. *Lovering v. The Mercantile Ins. Co.*, 12 Pick. 348.

It is equally well settled that if a wrecked or sunken vessel is repaired or weighed, although at an outlay which shows that the injury was constructively total while it continued, a subsequent abandonment, will be invalid, and the insured can only recover the expense actually incurred. The law was so held in *Humphreys v. The Union Ins. Co.*, 3 Mason, 429, notwithstanding the sale of the vessel after her arrival under a bottomry bond given by the master to obtain the means of making the repairs, which cost more than half her value. The point has been decided in the same way in numerous instances; *Bradlie v. The Maryland Ins. Co.*, 12 Peters, 378, 406; *Dickey v. The New York Ins. Co.*, 4 Cowen, 222, 3 Wend, 658; *Depau v. The Ocean Ins. Co.*, 3 Cowen, 63; *Benson v. Chapman*, 6 M. & G. 792; 5 C. B. 330; and would seem plain on principle, because the actual loss must necessarily, when ascertained, be the measure of the indemnity. *Hamilton v. Mendes*, 2 Burr. 1198 (ante, 677). Such a case is not substantially different from that which would arise if money were borrowed to make repairs on the credit of the owners, which they were unable to repay, and the ship was sold under a judgment and execution for the debt. *Humphreys v. The Union Ins. Co.*; *Chapman v. Benson*. It will make no difference in the application of this principle, that the master acts without the knowledge of the owner in making the repairs, or, as the rule is held in England, that the cost exceeds her value. *Chapman v. Benson*. Such at least was the decision of the Exchequer Chamber, in *Benson v. Chapman*, reversing that of the court below. The question arose in this instance under a policy on freight, but the judgment would apparently have been the same if the insurance had been on the vessel.

It is, however, generally conceded that the acts of a third person, or even of the master, beyond the scope of his implied power, will not preclude the right of abandonment unless they are authorized or ratified by the owner. See *Goss v. Withers*, 2 Burr. 683; *Chapman v. Benson*; *Paddock v. The Ins. Co.*, 2 Allen, 93.

In *Benson v. Chapman*, the court said that there was nothing in the special verdict to show that a prudent owner uninsured would not have repaired the vessel, and that in the absence of proof, the presumption was, that the course of the master in taking measures to complete the voyage was a proper one in view of all the circumstances. If his act had been wrongful or in bad faith, it might have been disavowed by his principals.



Whatever the rule may be in such cases, it seems clear that when the insured sues for the total loss of a vessel which has been sold, on the ground of necessity, for the benefit of all who are concerned, it will not be a sufficient answer that she was repaired or got off by the purchaser before action brought. See *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27; *Bradlie v. The Maryland Ins. Co.*, 12 Peters, 378; *The Brig Sarah Ann*, 2 Sumner, 206.

In like manner, when a vessel which has been deserted at sea by the crew, is brought into port by third persons who have a lien for salvage to an amount which exceeds her value, the insured may abandon and recover for a total loss, because the salvors may withhold the vessel until they are paid, and the property is not in any just sense restored. *Holdsworth v. Wise*, 7 B. & C. 794. This case was cited with approbation in *Chapman v. Benson*; and a similar principle was applied in *Lovering v. The Mercantile Ins. Co.* 12 Pick. 348.

It results from what has been said, that events occurring before an abandonment, and not known till afterwards, may be taken into view in determining whether it is valid. So far the English and American cases agree. But there is a wide divergence as to the weight due to subsequent events. These agreeably to the course of decision in the United States, are only admissible as evidence of the condition of the property at the time. If for instance a stranded or sunken ship is gotten off or weighed, it may show that the peril was not such as to constitute a total loss and justify the owners in abandoning. But while the liberation of a captured vessel may invalidate a prior abandonment in England, it will not have that effect in the United States, because the decree of restitution does not operate retroactively, or render the detention less injurious while it continues. See *Peele v. The Merchants' Insurance Company*, 3 Mason, 27; *Bradlie v. The Maryland Insurance Company*, 12 Peters, 378; *Wood v. The Lincoln & Kennebeck Insurance Company*, 6 Massachusetts, 479; *Hall v. The Franklin Insurance Company*, 9 Pick. 466; *Deblois v. The Ocean Insurance Company*, 16 Id. 303, 311; *Peele v. The Suffolk Insurance Company*, 7 Id. 304.

The question whether the right of abandonment depends on the existing condition of the property, or on the event at the time of action brought, is settled in England in favor of the latter alternative. In *Bainbridge v. Neilson*, 10 East, 392, where a captured vessel was abandoned after she had been recaptured, but before the intelligence arrived, Lord Ellenborough limited his decisions to the point actually before the court, that information which has ceased to be true must be viewed as if it had always been false, and is not therefore a valid cause of action. But he was strongly of opinion in accordance with the dicta of Lord Mansfield in *Hamilton v. Mendes* (ante, 677), that

the measure of the compensation should be sought in the loss as it exists when the plaintiff sues, and not as it may have been at an antecedent period. This view is sustained by the subsequent course of decision, which establishes that subsequent events may defeat an abandonment, which would have been valid, if the condition of the property had remained the same. *Patterson v. Ritchie*, 4 M. & S. 393; *McIver v. Henderson*, Ib. 584; *Brotherton v. Barber*, 5 Id. 418; *Naylor v. Taylor*, 9 B. & C. 718. In the words of Lord Ellenborough, in *McIver v. Henderson*, "the nature of the damnification, at the time when the action is brought, is to be regarded as the criterion of the right to recover as for a total loss, and if, at that time, what had antecedently been a total loss, has, by subsequent events, ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered." Similar language was held by Lord Tenterden, in *Naylor v. Taylor*. "The particular adventure," said his lordship, "on which the goods in question were sent, has indeed been defeated; but this fact will not in itself make the underwriters liable for a total loss. It, therefore, becomes necessary for the plaintiffs to show that the abandonment has the effect of enabling them to recover as for a total loss. If the abandonment is to be viewed with regard to the ultimate state of facts, as appearing before the action brought, according to the opinion of the court, in *Bainbridge v. Neilson*, there has not, for the reason already given been a total loss." The case of *Holdsworth v. Wise*, 7 B. & C. 794 (ante, 681), does not conflict with this principle, because the injury including the lien for salvage exceeded the value of the ship.

It is accordingly well settled at the present day in England, that the insured cannot make that a total loss by abandoning, which the event shows to be merely partial. In *Kemp v. Halliday*, 1 Q. B. L. R. 520, the ship went to the bottom, and could not in the opinion of a competent surveyor be saved without an expense exceeding her whole value. The owners thereupon abandoned and claimed a total loss. A shipping agent subsequently raised the vessel for the benefit of all concerned, at a cost which, after deducting the proportion to be contributed by the cargo, was less than she was worth. The court held, that inasmuch as the loss was merely partial when the plaintiff sued, it was immaterial that it had a different character at an antecedent period.

When, however, the state of things is shown to have been such as to warrant the insured in abandoning for a total loss, the burden of proof is on those who aver that it has ceased, and it will not be enough to show that the ship or goods were extricated from the peril in which they were involved, and brought in specie to their destination, unless it also appears that they came to the use or possession of the insured, free from any let or hindrance for which the insurers are responsible. *Lorenzo*

v. *Jamison*, 2 Ellis & Ellis, 160, 178; *Holdsworth v. Wise*; *Kemp v. Halliday*.

On the other hand, it is no less clear under the decisions in the United States, that if an abandonment is justified by the condition of the property at the time, it will not fail in consequence of events occurring subsequently and before suit brought. The question arose in *Rhineland v. The Insurance Company of Pennsylvania*, 4 Cranch, 28, on evidence that a vessel, which had been abandoned while she was held adversely by her captors, was liberated subsequently before the plaintiff sued.

"It remains then to inquire," said Chief Justice Marshall, "whether the return of the vessel deprives the assured of the right to resort to the underwriters for a total loss which was given by the abandonment. This point has never been decided in the courts of England. In the case of *Hamilton v. Mendes*, Lord Mansfield leaves it completely undetermined, whether the state of the loss at the time the abandonment is made, or at the time of action brought, or at the time of verdict rendered, shall fix the right to recover for a partial or total loss. A majority of the judges of this court are of opinion, that the state of loss at the time of the abandonment must fix the rights of the parties to recover on an action afterwards brought."

An abandonment made during the detention of the ship by capture, was sustained in like manner by the Supreme Court of Massachusetts, in *Lee v. Boardman*, 3 Massachusetts, 238, although she was liberated and arrived in port before the suit was instituted. In deciding this question, Parker, J., who delivered the opinion of the court, observed, that if the opinion expressed by Lord Mansfield, in *Hamilton v. Mendes*, that the final event should be the test, was "taken without qualification, it conflicted with other principles which had been established by that eminent judge, with much more precision and greater strength of reasoning." So in *Wood v. The Lincoln & Kennebeck Insurance Company*, 6 Massachusetts, 474 (post), it was said by Chief Justice Parsons, that if the plaintiff had the legal right to abandon when he made the offer, the verdict which had been rendered in his favor must stand, notwithstanding the subsequent recovery and arrival of the vessel.

It is accordingly established in the United States, that if an abandonment is justified by the condition of the property at the time, it will not fail in consequence of subsequent events. *Humphreys v. The Union Insurance Company*, 3 Mason, 429; *Peele v. The Merchants' Insurance Company*, *Ib.* 27.

The American rule, and the difference between it and the English, were stated by Story, J., in *Peele v. The Merchants' Insurance Company*. "As preliminary to the first inquiry, I think it important to notice a difference between the courts of this country and those

of England, in respect to the right of abandonment. With us, an abandonment once rightfully made is conclusive between the parties, and the rights flowing from it are not divested by any subsequent events, which change the situation of the property, and make that which was a total loss at the time of abandonment a partial loss only. And the right of abandonment is to be decided by the actual facts at the time of the abandonment, and not merely by the information of the assured; and, consequently, if the facts do not then warrant it, no prior or subsequent events will give it any greater efficacy."

"This is the established doctrine, as I take it, of all, or at least of the principal commercial States; *Wood v. The Lincoln & Kennebeck Insurance Company*, 6 Massachusetts, 479; *Juvenal v. The Insurance Company*, 7 Johnson, 412; and has been solemnly settled upon the fullest deliberation, by the Supreme Court of the United States. *Rhineland v. The Insurance Company*, 4 Cranch, 29."

The rule in the English courts is, as we all know, very different. There it has been held, that if an abandonment be rightfully made, it is not absolute, but may be controlled by subsequent events; so that if the loss has ceased to be total at any time before action brought, the abandonment becomes inoperative; *McCarthy v. Abel*, 5 East, 333; *Bainbridge v. Nelson*, 10 Id. 329; *Patterson v. Ritchie*, 4 M. & S. 338. It was also said, that if the English rule was sustained by the authority of Mansfield, it had been questioned by Eldon, and was contrary to the doctrine of Emerigon and Valin.

It still remained to determine whether the right of abandonment depends on the apparent condition of the vessel, or on her actual condition as disclosed by subsequent events. A ship is sunk or stranded on an exposed and dangerous coast, and cannot, in the judgment of experts, be saved without a disproportionate expense, nor unless the weather remains calm, and favors the attempt. The master thereupon desists from effort, and an abandonment takes place. The vessel is afterwards recovered through the exertions of the underwriters, or of the purchaser to whom she has been transferred, aided by an unusually high tide and tranquil sea. Does this invalidate the abandonment, and preclude a recovery for a total loss?

This question arose, and was decidedly negatively, in *Peele v. The Merchants' Insurance Company*, 3 Mason, 27. It was contended on behalf of the defendants, that their success in rescuing the vessel, showed that her condition was not such as it had been represented by the insured, and did not warrant a recovery for a total loss. The court were, however, clearly of opinion, that an owner whose ship is in peril, must be governed by probabilities, and not by the final event, which is not known. If the danger was imminent, and the prospect of saving the vessel too small to warrant the expense of making the attempt, the

insured might abandon as for a total loss. When such a cession was justified by existing circumstances, it conferred a vested right, that would not be defeated by a subsequent or fortuitous result.

This view was followed and confirmed in *Bradlie v. The Maryland Insurance Company*, 12 Peters, 78. It was said that subsequent events might be persuasive evidence that the condition of the property was not such as to constitute a constructive total loss. Proof that the vessel had actually been repaired for less than fifty per cent. of what she was worth, would obviously refute an allegation that the injury exceeded half her value. Where, however, the question was not as to the extent of an antecedent loss, but whether the vessel could be saved from an impending peril, the insured must necessarily act on probabilities, and it would be unjust to subject his conduct to the criterion of events that could not reasonably be anticipated. "In those cases," said Story, J., who delivered the opinion of the court, "where the abandonment is founded upon a supposed technical total loss, by a damage or injury sustained, exceeding one-half the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proofs to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half, this, so far as it goes, affords an inference the other way. But it is not, and in many cases cannot be decisive of the right to abandon. In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment, although, by some fortunate occurrence she may be delivered from her peril without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril are at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond the half value, and if her distress and peril be such as would induce a considerable owner uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good. It was such a case that Lord Ellenborough alluded to, in *Anderson v. Wallis*, 2 M. & S. 240, when he said, "There is not any case, or principle, which authorizes an abandonment, unless where the loss has actually been a total loss, or in the highest degree of probability at the time of abandonment." Mr. Chancellor, Kent, in his learned Commentaries (3 vol. 321), has laid down the true results of the doctrine of law on this subject. "The right of abandonment," says he, "does not depend upon the certainty,

but upon the high probability of a total loss, either of the property, or of the voyage, or both. The insured is to act, not upon certainties, but on probabilities, and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at less expense."

The right of abandonment has in like manner been said by many of the State courts, to depend on the apparent condition of the vessel, and the probable cost of making repairs, or extricating her from the peril in which she is involved. *Norton v. The Lexington Insurance Company*, 16 Illinois, 235; *The Insurance Companies v. Goodman*, 32 Alabama, 108; *McConochie v. The Sun. F. and M. Insurance Company*, 3 Bosworth, 99; *Graham v. Ledda*, 17 Louisiana, 45; *The Cincinnati Insurance Company v. Bakewell*, 4 B. Monroe, 541; *The Brig Sarah Ann*, 2 Sumner, 206. In arriving at a conclusion on these points, the opinion of men who, from their acquaintance with the subject, may be regarded as experts, is, if not conclusive, entitled to much weight; and if they testify that the course of the master and owners in desisting from the attempt to save the vessel, was such as a prudent man would have taken in view of all the circumstances, the loss will not be less total because the result shows that a different line of conduct would have been more advantageous. See *The Brig Sarah Ann*.

The courts of Massachusetts follow a different doctrine, which diverges widely from that of the Supreme Court of the United States. The right of abandonment depends, agreeably to their decisions, on the actual condition of the property as disclosed by the whole course of events. The most certain test is that of experiment, and the success of the underwriters or of any one acting with or without the authority of the insured, in saving and repairing a stranded or sunken vessel at a cost of less than half her value, will be a conclusive proof of the invalidity of an abandonment made during the continuance of the peril, and based on an allegation that the injury was constructively total as equalling fifty per cent. of the property at risk. *Wood v. The L. & K. Ins. Co.*, 6 Mass. 479; *Peel v. The Suffolk Ins. Co.*, 7 Pick. 204; *Deblois v. The Ocean Ins. Co.*, 16 Pick. 203; *Hall v. The Franklin Ins. Co.*, 9 Pick. 466; *Reynolds v. The Ocean Ins. Co.*, 22 Id. 192; 1 Metcalf, 160.

This course of decision seems to have originated in the just and reasonable proposition advanced by Chief Justice Tilghman, in *Ritchie v. The United States Ins. Co.*, 5 S. & R. 507 (post), that if the insurer will undertake to repair the damage, though exceeding one-half the value, he may do it, and the insured shall not abandon, because, if his ship be repaired it is all that he has a right to demand, and the more or less of cost is immaterial to him. In other words, as such a restoration of the property is a substantial performance of the contract, the insured

is not entitled to compensation for a breach which does not, in point of fact, occur. When, however, the question arose in *Wood v. The Lincoln & Kennebeck Ins. Co.*, Chief Justice Parsons took the less tenable position that the effect of such action on the part of the insurers depends on the very point which Tilghman had declared to be immaterial, whether the cost equals or is less than half the value of the vessel. In the former alternative the abandonment will stand, in the latter it must be set aside. This principle has governed the subsequent course of decision in Massachusetts. See *Chase v. The Commonwealth Ins. Co.*, 20 Pick. 143; *Reynolds v. The Ocean Ins. Co.*, 22 Id. 191; 1 Metcalf, 160. The success of the underwriters in recovering the vessel is merely evidence, but it is evidence which may be conclusive that the loss was only partial.

"The insured maintain," said Putnam, J., in *Chase v. The Commonwealth Ins. Co.*, "that the validity of the abandonment should be determined by the supposed damage. The insurers say, that the real damage is the criterion; the insured contend, that the question should be decided by evidence that the vessel lay upon the beach at the time of abandonment. Now that was precisely what the insurers were, in our opinion, under no legal obligation to permit. They might lawfully do what the underwriters did in the case of *Wood v. The Lincoln & Kennebeck Ins. Co.*, refuse to accept the abandonment for a total loss, and demonstrate, by their own act in relieving and repairing the vessel, that such a claim was unfounded."

In this conflict of authority it is not easy to decide. The doctrine of probabilities may be heretical and dangerous when applied to moral problems. Duties may vary with circumstances, but there can be but one rule of duty under a given state of facts. When, however, the question is one of fact, depending on future and unknown contingencies, no judgment can be sound which disregards the probable result. In determining whether a stranded vessel shall be sold, it is necessary to consider the season of the year and the danger to be apprehended from the winds and waves. It may be physically possible to get her off and yet unwise to incur the cost of an attempt that must fail if there is a storm. The calculation is, in effect, one of chances, and may, even when just and accurate, be falsified by the event. *The Brig Sarah Ann*, 2 Sumner, 206, 13, Peters, 387.

This is equally true of the cognate inquiry as to the existence of a total loss. To hold that the success of the insurers in recovering a stranded vessel will demonstrate the invalidity of an abandonment made while she was on the rocks, is, in effect, holding that an escape from peril proves that the danger did not exist. The true ground was taken by Chief Justice Tilghman, that the restoration of the vessel is

a performance of the contract and precludes a demand for compensation.

It has been seen, an abandonment is in general an indispensable condition, without which the insurers will not be answerable for a constructive total loss of that which has not been actually destroyed (*ante*, 676). *Smith v. The Manufacturing Insurance Company*, 7 Metcalf, 448; *Thomas v. The Rockland Insurance Company*, 45 Maine, 116. It will, therefore, ordinarily be a sufficient answer to such a claim, that the title has been transferred by sale or mortgage to a third person, and does not pass under the cession made by the insured. *Gordon v. The Massachusetts F. & M. Insurance Company*, 2 Pick. 240; *Price v. The Ocean Insurance Company*, 18 Idem. 83; *Badger v. The Ocean Insurance Company*, 23 Id. 347; *Smith v. The Manufacturing Insurance Company*; *Knight v. Faith*, 15 Q. B. 649. In *Knight v. Faith*, a sale by the master, who was also a part owner, was accordingly held to preclude a recovery for a total loss. This, however, is only true of a sale made or authorized by the owner, and does not apply when the master sells wrongfully, or under an authority conferred by necessity. *Price v. The Ocean Insurance Company*, 40 Maine, 481; *Roux v. Salvador*, 1 Bingham, N. C. 3 Id. 266. In the former case, the act being void does not change the relative positions of the parties, in the latter, it is for the benefit of all concerned, and binds the insurers as well as the insured. *The Brig Sarah Ann*, 2 Sumner, 206; *Price v. The Ocean Insurance Company*. Under these circumstances, the insured need not go through the form of abandoning, because he has nothing left to cede. In *Farnworth v. Hyde*, 18 C. B., N. S. 835, the ship and cargo were sold under circumstances constituting a moral necessity for an immediate sale, and the underwriters on the cargo were held to be answerable for a total loss, without notice of abandonment. It was said that the judgment in *Knight v. Faith*, accorded with *Roux v. Salvador*, in holding that there might be a total loss without an abandonment, when a sale had been made in good faith under the pressure of a necessity which did not admit of delay. *Wood v. The Lincoln & Kennebeck Ins. Co.* "I agree," said Byles, "that if the cargo had been sold by the captain of the vessel, because the expense of forwarding it to its destination would have exceeded its value when so forwarded, it would have been rightly sold; that a sale under such circumstances would have changed the property; and that there would then have been not merely a constructive, but an actual total loss, for which the insured might have recovered without abandoning." The principle is the same, when the ship cannot be repaired without an expense which no reasonable man would incur, and is sold for the benefit of all concerned. *Fuller v. The Insurance Company*, 31 Maine, 325. *The Mutual Safety Insurance Company v. Cohen*, 3 Gill, 459; *Gordon v. The F. & M. Insurance*



*Company*, 2 Pick. 249, 265. The case of *Tudor v. The New England Insurance Company*, 12 Cushing, 554, inclines to this view of the question, although the point was not decided.

It has, however, been held in other instances, that the insured must abandon even where the sale is rightful, because the insurers cannot otherwise collect the proceeds to which they are obviously entitled. *The American Insurance Company v. Francia*, 9 Barr, 390; *Smith v. The Manufacturers' Insurance Company*, 7 Metcalf, 448.

The assent which is essential to the validity of a grant will be implied when it is made in pursuance of a contract that is obligatory on the grantee. Accordingly, while an owner who abandons without a sufficient cause, may recall the transfer at any time before acceptance; *The Columbian Ins. Co. v. Ashby*, 4 Peters, 139; a valid abandonment is mutually binding and cannot be rescinded unless both the parties agree. *King v. The Middleton Ins. Co.*, 1 Conn. 184. The notice of abandonment must generally be given forthwith by the insured, or within such a reasonable time as may serve to put the insurer on his guard (ante, 676); but the insurer will not be precluded from disputing the validity of the act by withholding his reply until full and accurate information can be procured; *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27; because silence is not acquiescence unless the circumstances make it a duty to speak. See *Hudson v. Harrison*, 3 Brod. & Bing. 97; *Cowell v. The Railroad*, 4 Casey, 329. When, however, an abandonment has once been accepted, with a knowledge of the facts, it will have the obligation of a contract, and neither party can take the ground that it was originally invalid. *Smith v. Robertson*, 2 Dow. 470. Assent may be implied from any exercise of ownership or dominion on the part of the insurers, even for the purpose of repairing the ship and restoring her to the insured; *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27; *Peele v. The Suffolk Ins. Co.*, 7 Pick. 204, or from a failure to reject within a reasonable time, *Hudson v. Harrison*. But the insurers will not waive their right by taking measures for the safety and preservation of property which is not duly cared for by the master or owner, although the extent and limits of their power in this behalf are not well defined (post).

## ABANDONMENT. CONSTRUCTIVE, TOTAL LOSS.

PASCHAL N. SMITH, PRESIDENT OF THE COLUMBIAN INSURANCE COMPANY, AGAINST WILLIAM BELL, JOSEPH BELL, AND SAMUEL WATSON.

Cases in Error, New York.

FEBRUARY TERM, 1805.

[REPORTED, 2 CAINES'S CASES IN ERROR, 153-158.]

*To constitute a technical total loss of a ship, by damage, from the perils insured against, she must be injured to the amount of half her value, or more, after deducting the one-third, new for old, allowed the underwriter ; that is, she must be injured to the extent of three-fourths of her value, or more.*

In error, upon a bill of exceptions, tendered and sealed on the trial of this cause, at the Circuit Court, in the city of New York, in which the now defendants were plaintiffs.

The action was on a policy of insurance on the ship *Mary Ann*, valued at 14,000\* dollars, "at and from Charleston to Glasgow, and at and from thence to Philadelphia, or one other port in the United States."

The plaintiffs went for a technical total loss, in consequence of the vessel's having been stranded on the coast of Scotland, and injured to an extent which required 7,221 dollars to repair. They gave in evidence a subsequent sale of the vessel at Greenock, on account of those who might be concerned, the purchase by the firm of Archibald Campbell & Co., and her reparation at an expense exceeding half her value. The defendants relied on their having paid into court the sum of 5,100 dollars, contending, that as the amount of expenditure for repairs, was only 7,221 dollars, and they were entitled to a deduction of one-third, new for old, they were chargeable with only 4,884 dollars 32 cents, which, not amounting to half the value of the vessel, could not constitute a

\* There is some uncertainty as to this in the printed case. The first page states it to be an open policy ; the second, that "in and by" the policy, she was "valued at," &c.

technical total loss. That, therefore, as they had paid into court, 5,100 dollars, the verdict ought to be in their favor, it being the law, that the allowance of one-third new for old, should be made, before the right of recovering as for a total technical loss, on account of damage sustained under the policy, could arise.

The judge, however, at *nisi prius*, thinking otherwise, the verdict was, under his direction, given for the plaintiffs, and the case now came up on this single question; whether the underwriter on a ship is liable for a total loss, when the injury she receives, from the perils insured against, deteriorates her more than half, without deducting the one-third, new for old; or, whether the one-third, new for old, must not first be allowed the insurer, and the injury, after that deduction, amount to the half of her worth, or more?

The determination at *nisi prius*, was founded on a decision of the Supreme Court, in the case of *Deputy v. United Insurance Company*, in which, from the notes of Kent, C. J., it appears that the court ruled to this effect:—

Where the repairs are equal to half the value, and more, the insured have a right to abandon. The rule is general, and has no reference to the distinction of new for old. It is the actual expenditure, or damage which is taken into view, and on the abandonment, the insurer has all the benefit of the repairs. The rule of deducting one-third, new for old, can be applied only in a case of partial loss. Here there was a clear case for abandonment, and the plaintiff must have judgment.

*Per Curiam*, delivered by LANSING, Chancellor.—On this case, only two questions are presented for the consideration of the court. 1st, Whether, on a policy of insurance, on the estimate of repairs of a vessel, injured by any of the perils insured against, new materials substituted for the old, do not entitle the insurer to an allowance? and if so, 2d, At what period is the allowance to be admitted?

These questions are open here. They must, in a great measure, depend upon general reasoning, drawn from the nature of the contract of insurance, and that reasoning may be comprised in very narrow limits.

The vessels employed in commercial enterprises are of various degrees of strength and durability, and more or less adapted to resist the perils of the seas; but the lowest grades in which they

are recognized, as subjects of insurance, is when they are barely seaworthy.

The hull, masts, sails and rigging of a vessel may be in a situation to constitute her seaworthy, and yet be much inferior to what they were when they came from the hands of the workmen who constructed them; and a regular gradation may easily be conceived between a vessel perfectly new, well built, rigged, and furnished, and one that is barely seaworthy. When an injury is sustained by a vessel of the latter description, and it becomes necessary to supply her old masts, timbers, sails and rigging with new, it is evident that in all these particulars, she must, in most instances, be placed in a better state by the repairs, than she was in before the injury received, the ordinary wear and tear not being within the purview of the policy. Hence, the repairs are carried to a point beyond the mere reinstatement of the vessel, and beyond the indemnity intended.

In the case of *Da Costa v. Newnham*, determined in the British Court of King's Bench, since the revolution, the usage which obtained with respect to the repairs, of allowing one-third, new for old, seems to have been acknowledged, and it is now urged in argument, that at any rate, whether or not the defendant was entitled to this allowance, was a question for the jury, *as it depended upon usage*. Buller, Justice, speaks of it as a usual allowance, and Ashhurst, J., observes, that the allowance of one-third for repairs, *is the rule*, where the ship is repaired and delivered over again to the owner, for his benefit. That case arose, on a technical total loss, which the insured did not avail himself of, by abandoning. The recovery was for an average loss of upwards of eighty per cent. The ship had been repaired at the instance of the insurers. They refusing to pay for the repairs, a bottomry bond was executed on the vessel, in consequence of which, she was sold to satisfy the debt.

It was contended that the value of one-third of the repairs ought to be deducted, and the answer to this, which appears to me conclusive, was, that the repairs, having added to the value of the vessel, must have been compensated for, in the sale, on the bottomry bond, and the owners never had the ship, so they could not be the better for the repairs.

From the expressions made use of by the judges who decided this case, it does not appear that they relied upon the usage of any *particular* trade, but upon the usage of trade generally; and as

there is no power on earth to enact positive regulations for the wide extended regions of marine enterprises, general usage, established from the principles of general convenience, and sanctioned by the experience and practice of merchants, is the only source of general maritime law.

The rule that constitutes the loss of more than one-half the value of the subject insured, a total loss, is a positive one, originating in the convenience of having a determinate and precise test in all cases, which by its universality and uniformity, may render inquiries into minute objects, rather calculated to perplex than to elucidate, unnecessary.

The precise difference between the value of the new and old materials, must generally be difficult to ascertain. The difficulty is much increased by the estimate necessarily required of the value of the old, at the home port, and of the new, at the port of repair. It is, therefore, desirable to have some invariable standard, not calculated, for that is impracticable, to meet precisely all the variety of cases which may occur, so as to render exact justice in each; but such a rule as will nearest approximate to producing that effect, if generally applied. That effect, if a rule respecting the subject is to obtain, it was not contended, might not be produced in the proportion alluded to in the case of *Da Costa v. Newnham*. From the nature of the contract of insurance, I think the allowance for replacing the old materials with the new, is reasonable and proper; and, if so, that as the deduction is professedly made, on the principle that the value of the subject insured, has been enhanced to that amount, that deduction ought to be made, before the test of technical total loss or not is applied; for the doctrine of technical total loss is expressly founded on the position that the subject insured has been deteriorated more than one-half.

I am, therefore, of opinion, that the judgment of the Supreme Court be reversed.

Judgment of reversal.

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ABEL WOOD *v.* THE LINCOLN AND KENNEBECK  
INSURANCE COMPANY.

In the Supreme Judicial Court of Massachusetts.

JUNE TERM, 1810.

[REPORTED, 6 MASSACHUSETTS, 479-486.]

*When the right to abandon has once vested, and been exercised, it cannot be defeated by subsequent events. But subsequent, as well as cotemporaneous events, may be taken into consideration in determining whether the right to abandon existed. And even where the condition of the vessel is such at the time of abandonment, that the insured are not bound, to take on themselves the risk and expense of salvage, an offer by the insurers to repair the vessel and restore her in good condition, made and executed within a reasonable time, will defeat the right of abandonment.*

[\*The action in this case was brought on a policy of insurance, underwritten by the defendants, for the sum of four thousand dollars, on a vessel belonging to the plaintiff, valued at the same sum, and a verdict was taken for him by consent at the trial, subject to such modification as the court might think proper, on a statement of facts agreed on between the parties.

It appeared by this statement that the vessel insured, while proceeding up the river on which her port of destination was situated, had been driven by a high wind upon the rocks of the shore, where she was upset, and at high water nearly submerged. An abandonment was made the next day to the defendants, which they refused to accept, and having succeeded in weighing the vessel (although not until she had been sunk in the attempt), put her in repair, and offered her to the plaintiff within fifteen days from the period of the original disaster. This offer was rejected, and the action brought to recover for a total loss.]

After argument the following opinion was delivered by —

PARSONS, C. J. If the plaintiff, when he made the offer to

\* The syllabus and statement of the reporter are omitted.

abandon, had a legal right to abandon, the verdict must stand, notwithstanding the subsequent recovery and arrival of the vessel. The right to abandon is a vested right, and when legally exercised, the assured is entitled to recover as for a total loss; which subsequent events cannot prevent, unless with his consent, manifested expressly or by reasonable implication from his subsequent conduct.

The principal question therefore is, whether the plaintiff had a right to abandon at the time he made the offer. When a ship becomes a wreck, by any of the perils insured against, it is generally a total loss, and the owner may abandon. And a ship becomes a wreck, when, in consequence of the injury she has received, she is rendered absolutely innavigable, or unable to pursue her voyage, without repairs exceeding the half of her value. In this last case, she is not worth repairing, by reason, not of age or natural decay, but by reason of the injury received from some peril. For although the materials, or most of them may remain, yet such is the disabled state of the ship, which they composed, that she can no longer retain her character of a navigable vessel.

By comparing this definition of a wreck with the facts, it is apparent that the plaintiff's vessel could not be considered as having been wrecked. For although she was driven on rocks near the shore, and oversetting, was filled with water, and sunk, yet she was very soon after, in fact, weighed, and, being navigable, was carried to her port of destination, and made fast to a wharf.

When a ship is stranded, the assured cannot, for that cause merely, immediately abandon. By some fortunate accident, by the exertions of the crew, or by extraneous assistance, the ship may be again floated, and rendered capable of pursuing her voyage. In such case, the insurers are only answerable for the expenses occasioned by the stranding; and as liable for a partial loss, they must pay the assured his reasonable charges for getting the ship off, and for repairing the damages she may have received by the stranding. But, undoubtedly, when by the stranding the voyage is defeated, the owner may abandon. And the stranding of the ship may prove the destruction of the voyage, either by her afterwards becoming a wreck, before she shall be put afloat, or by circumstances accompanying the accident. A ship may be driven on some of the beaches, without sustaining essential injury, although she may be bilged; but in good weather she may

be easily got off, and repaired so as to prosecute her voyage; but if she be wrecked by a subsequent storm, while she remains stranded, the owner may abandon. Or a ship may be stranded on a part of the coast where no assistance can be procured to get her afloat, or where there may be no materials or workmen for repairing the damages she may have sustained; and in a case like this, the voyage is lost, and the assured may abandon. Or if the ship be stranded in a place where assistance, materials and workmen, may be easily procured, but it may be doubtful whether the attempt to get her off will succeed, while the expense is certain,—if the insurer, on having notice, will not engage to pay the expenses of the attempt, and also to repair the vessel, if the attempt should succeed, the assured may abandon. For in this case, as he cannot recover more than a total loss, he shall not be holden to labor for the recovery of the ship, which he must do at his own expense, if he should be unsuccessful.

Another case in which the owner may abandon in consequence of his ship being stranded, may be stated. If the stranding happen at a place and in a season of the year when the ship cannot be speedily got off, but the owner must wait so long for a favorable time, that the voyage is defeated, he is not obliged thus to wait, but may throw the loss on the insurers by an abandonment.

But if the ship be stranded in a place where sufficient assistance can be obtained, and she may be in a short time got off and repaired for the prosecution of her voyage—as neither the ship nor the voyage is lost, there is no ground on which the owner can abandon his ship and recover for a total loss. And where the stranding is under such circumstances, that the attempt to recover and repair the ship, in a reasonable time for the prosecution of the voyage, may be hazardous but not hopeless—if the underwriter will engage to pay all the expenses, whatever may be the event, the owner cannot abandon, until he has used such reasonable endeavors to recover his ship, and has eventually failed. And, *à fortiori*, if the underwriter will himself undertake, at his own expense, for the owner, the recovery of his ship, and shall succeed, and offer to restore her to him, so that he may seasonably prosecute his voyage, the owner cannot abandon, for neither the ship nor the voyage is lost.

These principles of the law of insurance are now to be applied to the case at bar.

The vessel insured appears not to have been wrecked, but to



have been stranded on some rocks on her passage home, in Sheepscut River, and within less than five miles of her port of destination. On stranding, she overset and was filled with water; and in a day or two after, being disengaged from the rocks, she sunk in deep water, which covered her. It is not stated that she received any essential injury by this accident, or that an attempt to weigh her and prepare for finishing her voyage, would have been hazardous or very expensive. It does not appear that the plaintiff made any attempt, or offered the defendants to make any, if assured of the reimbursement of his expenses. It is not stated that the vessel was stranded, where no assistance, materials, or workmen, could be seasonably procured. But it is stated that the plaintiff offered to abandon her on the day after she was stranded, and before she sunk in deep water;—that the defendants refused to accept this offer; and they undertook to recover the vessel, succeeded in the attempt, carried her to the termination of her voyage, making her fast to a wharf in Wiscasset, then made considerable repairs upon her, and offered her to the owner.

To entitle the owner to abandon, there must be, at some period during the voyage, a total loss, either real or constructive. But in the present case no such loss has happened. The vessel has not been lost, nor has the voyage been defeated; but it appears that the voyage has in fact been performed; and that the vessel was in safety at her destined port.

It does not appear from the case, that the vessel was wholly repaired by the defendants; nor is it stated what degree of injury she sustained by the stranding. We cannot, therefore, presume that the injury was such as rendered her not worth repairing. Whatever it was, if the defendants have not repaired it, they are obliged by law to do it, or to reimburse the plaintiff his expenses of the repairs.

The case of *Furneaux v. Bradley*, Marsh, 503, arose on the stranding of the ship insured by a policy on time. The ship under the policy arrived at Quebec; but the lateness of the season preventing her return, she was removed into the basin for the winter, from whence, on the 19th of November, she was driven by a field of ice, and damaged by running on the rocks. Her condition could not be examined until April, when the policy had expired. She was then found to be bilged, and much injured, but not irreparably. In the progress of the repairs, difficulties arose for want of materials, and the master, after consulting the

merchants and agents, sold her. And it was determined that the ship should be considered as damaged by the stranding, and not as totally lost.

This is a very strong case against the plaintiff; for the ship could not, from the season of the year, be examined and repaired until the expiration of four or five months. But the principle of the decision is certainly correct, that neither the ship nor the voyage was lost by the stranding. If the ship, if not stranded, might have sailed on her return voyage, which was interrupted for a long time by the accident, the voyage in that case would have been lost by the stranding. But in that case, if the ship had been safe at her anchors, she could not have proceeded to sea during the season of the ice, and thus her voyage was not delayed.

We observed that the policy in the case at bar was upon time, and that, at the arrival of the vessel at Wiscasset, the policy had continuance for several months. If the plaintiff had afterwards employed her within the policy, and she had incurred a subsequent loss, total or partial, the defendants would have been holden to pay it, in addition to the partial loss, with which they are chargeable by the stranding in question.

As we are of opinion that the loss complained of is not total, but partial, the verdict must be set aside; and, by the consent of the parties, commissioners are to be appointed; to adjust the partial loss, and a verdict to be entered accordingly upon their report.

The object of the contract of insurance, which is well known to be the indemnity of the insured, may obviously be attained either by the payment of a pecuniary compensation for the loss, or by the restoration of the property to the condition in which it was before the injury happened. Both these methods might seem equally unobjectionable, and both are constantly pursued in the case of insurance against fire, where the insurers often check an exorbitant claim for damages by rebuilding the house at their own cost. A different rule, however, prevails in marine insurance, under which the insurers cannot substitute specific for pecuniary compensation, or take possession of the property unless under circumstances of great exigency, or when it has been ceded to them by the insured. *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27, 85.

The case of *Wood v. The Lincoln and Kennebeck Ins. Co.*, can hardly be said to contravene this principle, or detract from the strength of the general proposition that the control of the ship belongs to the owners, and cannot be taken out of their hands by the insurers, even for the purpose of repairing an injury caused by the perils of navigation. But it unquestionably qualifies or enlarges the prior course of decision, by authorizing the insurers to defeat an abandonment by showing that the loss was not total, and might have been repaired by the owners. It may, however, be well to preface the consideration of this case and of the consequences to which it leads, by a review of the circumstances which are held to give the right to abandon.

It might at first sight appear that nothing which falls short of the entire destruction of the property at risk, should be viewed as a total loss, and that all minor injuries should be compensated by the payment of a sum proportioned to their amount. If this rule were followed, the loss would necessarily be partial so long as any portion of the vessel remained in being and had an appreciable pecuniary value. It is, however, obvious that there may be a total loss of a thing which is not destroyed. That which is placed beyond the power and control of the owner and which he cannot regain, is lost in the common acceptation of the term. A coin dropped into a river may be within this definition, although it might be recovered by diverting the stream. It may be in sight and yet lost for all practical purposes, if there are no means of reaching it or bringing it to shore. *Moss v. Smith*, 9 C. B. 94. In like manner a vessel which is stranded where she cannot be set afloat, is as much lost as if she had foundered at sea, or been consumed by fire. *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27; *The Brig Sarah Ann*, 2 Sumner, 206. Her hull and rigging may be uninjured, and the owner or his agents on board, but her value as an instrument of navigation is wholly gone. The loss is, therefore, constructively, if not actually, total, and the insurers answerable to the full extent of the policy. The principle is the same when the vessel is captured by an enemy or belligerent; *Rhineland v. The Delaware Insurance Company*, 4 Cranch, 29; or blockaded in the port at and from which she is insured. For, although, the deprivation may be merely temporary, and followed by the liberation of the ship and goods, it is still for the time being actual, and the owner may abandon without waiting for the event. The insurers do not guarantee the completion of the voyage, but they do agree that it shall not be defeated by a cause enumerated in the policy and operating on the property at risk. The voyage is not insured, but the ship is insured for the voyage, and if the completion of it be prevented by an event against which the insurers have stipulated, the breach will not be less total because the vessel has undergone no actual injury. *Goss*

v. *Withers*, 2 Burr, 682; *Hamilton v. Mendez*, Ib. 1198; *Mills v. Fletcher*, 1 Douglas, 219; *Anderson v. Wallis*, 2 M. & S. 240; *Falkner v. Ritchie*, Ib. 290; *Alexander v. The Baltimore Ins. Co.*, 4 Cranch, 370; *Dickey v. New York Ins. Co.*, 4 Cowen, 222; *Center v. American Ins. Co.*, 7 Id. 564, 4 Wend. 45; *American Ins. Co. v. Ogden*, 15 Wend. 532, 538; 20 Id. 287, 532, 538, ante 676; *The Delaware Ins. Co. v. Winter*, 2 Wright, 176, 186.

The same rule prevails, when goods which have been insured from one port to another fail to reach their destination in consequence of the perils of the sea. *Tudor v. The New England Insurance Company*, 12 Cushing, 554; *Greene v. The Pacific Insurance Company*, 9 Allen, 228; *The Delaware Insurance Company v. Winter*; *Mordecai v. The Firemen's Insurance Company*, 12 Richardson, 512; *Hugg v. The Augusta Insurance Company*, 7 Howard, 595; *Rosetto v. Gurney*, 11 C. B. 176. In the language of Lord Ellenborough, "the total loss of the cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage." *Anderson v. Wallis*, 2 M. & S. 240; *Davy v. Milford*, 15 East, 554. The cargo remains under these circumstances, but the adventure is lost. And so, if the goods are too much injured to be carried forward, although they are not destroyed *Hugg v. The Augusta Insurance Company*; *Roux v. Salvador*, 1 Bing. N. C. 3 Id. 266. An injury to the ship which cannot be repaired, will, therefore, be a loss of the cargo, unless it can be forwarded in another bottom, without costing more than it is worth. Under these circumstances, the cargo may be abandoned to the underwriters, although it might be brought back to the place of departure, or sold where it lies for a higher price than it would bring at the port of destination. In like manner, if the goods are so much injured, that they cannot be carried forward with safety to life and health, or without perishing by the way through putrefaction, there will be a total loss, unless they could be landed, dried and reshipped at a cost, which falls short of the value which they would have if the voyage were completed. *Rosetto v. Gurney*; *Hugg v. The Augusta Insurance Company*. The reason is, that the law will not compel that which is vain and useless, or require more to be spent to save a thing than it is worth. *Moss v. Smith*, 9 C. B. 94. So, in considering whether the ship may be abandoned as for a total loss, the question is not merely whether she can be repaired, but how much it will cost. *Center v. The American Ins. Co.*, 4 Wend. 45. A temporary obstacle that can be overcome by reasonable diligence, and without a disproportionate expense, will not, however, justify an abandonment either of the goods or vessel, because the insurers are not responsible for mere delay, even when it occasions the loss of a market, or otherwise frustrates the

object of the voyage. *Smith v. The Universal Ins. Co.*, 6 Wheaton, 176.

It follows from what has been said, that a marine policy is virtually an agreement, that the property at risk shall not be injured, or the completion of the voyage prevented by the perils assumed by the insurers; and the fulfilment of the former branch of this stipulation, will not be an answer to action founded on a breach of the latter. "A total loss," said Mr. Justice Story, in *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27, 40, "in the contemplation of law, does not necessarily mean the certain destruction of the thing insured; it may technically exist when the thing is in safety, but is for the time being lost to the owner, or taken from his free use and possession." The word free here indicates, that if the property cannot be used for the purpose for which it was insured, the loss will not be less total, because it can be used for other purposes of a different kind. *Abbott v. Broome*, 1 Caines, 292. The detention of the vessel by a blockading squadron, is a constructive total loss within this principle, although it may terminate at any moment, and does not divest the title or possession of the owner. *Symes v. The Union Ins. Co.*, 4 Dallas, 41; *Olivera v. The Union Ins. Co.*, 3 Wheaton, 183. The insured has, in like manner, been held entitled to abandon when the vessel on approaching the port of destination, is notified of the existence of a blockade, and compelled to go elsewhere to avoid capture. *Schmidt v. The United Ins. Co.*, 1 Johnson, 249; *Craig v. The Union Ins. Co.*, 6 Id. 226; *Salters v. The Union Ins. Co.*, 15 Id. 523; *Thompson v. Read*, 12 S. & R. 440. An abandonment cannot be made from the apprehension of a peril that may not arise. When, however, there is an entire interdiction of commerce with the port of destination by a blockade or the presence of a hostile force, the insured is not bound to proceed at the risk of capture and condemnation, and may treat the loss as constructively total. *Schmidt v. The Union Insurance Company*; *Thompson v. Read*.

A different rule prevails on this point in England and Massachusetts, founded on a distinction between the interruption of the voyage by a peril, and by the act of the master from the fear that a peril will be incurred by going on; *Hadkinson v. Robinson*, 3 Bos. & Pul. 388; *Richardson v. The Marine Ins. Co.*, 6 Massachusetts, 102; *Brown v. The Union Ins. Co.*, 12 Id. 170; which would seem to be inapplicable when the danger is so certain or imminent that the voyage cannot be prosecuted without an entire loss of the property at risk. 2 Arnould on Insurance, 785; 3 Kent, 293; Emerigon *Traite des Assurances*, c. 12, sect. 26. It is established, that when the cargo is so much injured that it cannot be carried to its destination with safety to life and health, or without perishing by the way from decomposition, the master is not bound to incur the risk, and may proceed to an immediate sale;

*Roux v. Salvador*, 1 Bing N. C. 526, 3 Id. 266; and the principle would seem to be the same when the completion of the voyage is prevented by a well founded apprehension of any other peril.

The law was clearly stated by Story, J., in *Bradlie v. The Maryland Ins. Co.*, 12 Peters, 378, 460, in the following terms: "The mere retardation of the voyage by any of the perils insured against, not amounting to or producing a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss, which will authorize an abandonment. A retardation for the purpose of repairing damages from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine. Under such circumstances, if the ship can be repaired and is repaired, and is then capable of performing the voyage, there is no ground of abandonment, founded upon the consideration that the voyage may not be worth pursuing for the interest of the ship owner; or that the cargo has been injured, so that it is not worth transporting farther on the voyage; for the loss of the cargo for the voyage, has nothing to do with an insurance upon the ship for the voyage. This was expressly held by this court in the case of *Alexander v. The Baltimore Ins. Co.*, 4 Cranch, R. 370; where it was decided, that an insurance on a ship for a voyage, was not to be treated as an insurance on the ship and the voyage, or as an undertaking that she shall actually perform the voyage; and, only, that notwithstanding any of the perils insured against, she shall be of ability to perform the voyage; and that the underwriters will pay any damage sustained by her, from those perils, during the voyage." He added, "that in a time policy, the undertaking of the insurers, is, that the ship shall not by the operation of any peril insured against during the time for which the policy continues, be totally and permanently lost or disabled from performing the voyage then in progress, or any other voyage within the scope of the policy." The principle of this definition applies to a policy on a voyage.

It is obvious that a partial injury may be a total loss within this doctrine, if it incapacitates the ship for navigation, and cannot be repaired. *Allen v. Sugrue*, 8 B. & C. 561; *Young v. Twining*, 2 M. & G. 593; *Benson v. Chapman*, 6 Id. 792; *Manning v. Irving*, 1 C. B. 168; 2 Id. 784; 6 Id. 391; 1 Clark & Finelly, N. S. 287; *Center v. The American Insurance Company*, 7 Cowen, 564, 4 Wend. 45. The voyage is, under these circumstances, not merely delayed, but defeated by an obstacle which is insuperable. On the other hand, the insured cannot abandon for any cause that can be overcome by an expenditure falling short of the value of the property at risk. The consequential damage arising from the loss of time, or of profits is laid out of view; *Anderson v. Wallis*, 2 M. & S. 240; and the ques-

tion reduced to a pecuniary standard, which affords as near an approach to certainty as the circumstances will permit. If it will cost as much to repair the ship as she is worth, the owner may abandon; otherwise the loss is merely partial; *Moss v. Smith*, 9 C. B. 94; and such is substantially the rule in this country, although with a difference in the mode of computation, which will be hereafter noticed.

It was indeed said, in some of the earlier cases, and in a more recent instance, that if a prudent owner uninsured would not make repairs, the loss is total; *Irving v. Manning*, 1 Clark & Finelly, N. S. 287; *Fleming v. Smith*, Ib. 513; but these dicta must be taken with some degree of qualification, because an owner may properly be influenced by many considerations which are irrelevant to the contract of insurance. If the ship can be repaired for less than she is worth, the loss will not be total, although the circumstances are such that no prudent man of business would make the outlay. *Farnsworth v. Hyde*, 2 C. P., L. R. 204, 225. "Underwriters," said Baron Maule, in *Moss v. Smith*, "are responsible for losses arising from perils of the sea,—for such perils as are mentioned in the policy. If the ship is actually lost by a peril of the sea, or any other peril covered by the policy, the assured may call it a total loss. If she sustains damage to such an extent that she cannot be repaired at all, that also is a total loss. It may be that the injury sustained by the ship is irreparable, with reference to the place where she is; for instance, the ship may have met with the disaster at a place where no workmen of requisite powers are to be met with, or where the necessary materials are not to be found, so that to repair her there is altogether impracticable; and in such a case the loss would also be a total loss. But, short of that, it may be that it is physically possible to repair the ship, but at an enormous cost; and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance to recover it. So, if a ship sustains such extensive damage, that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay,—the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do, arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the courts have adopted, is this,—if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss."

The rule is the same where freight is in question, and renders the loss merely partial, unless the circumstances are such as to render it actually or virtually impossible, to forward the goods in specie to their destination; *Hugg v. The Augusta Insurance Company*, 7 Howard, 595; *Moss v. Smith*; that, however, being held impossible, under the definition in *Moss v. Smith*, which is impracticable, and nothing regarded as practicable, which cannot be done without an unreasonable and excessive cost. *Rosetto v. Gurney*, 11 C. B. 176. Hence, while the retardation of the voyage, in consequence of an injury to the ship or cargo, may render it more prudent, in the ordinary sense of the word to abandon the voyage than to prosecute it farther and take the chance of obtaining payment from the consignee after the deterioration of the goods has rendered the lien comparatively worthless, still, these circumstances form no part of the risk assumed by the underwriter, and do not constitute a breach of the contract of the insurer; *Ogden v. The General Marine Ins. Co.*, 2 Duer, 204; *Jordan v. The Warren Ins. Co.*, 1 Story, 342; *Lord v. The Neptune Ins. Co.*, 10 Gray, 109, 112. When, however, the vessel is so much injured, that she cannot be rendered fit for navigation without an expense which exceeds her value, and no other can be procured, it is a total loss of freight; and the same result will follow when the condition of the goods is such that they cannot be forwarded in specie at all, or without an unreasonable expense; that is, under the English rule, without an additional expense, which exceeds the whole amount due on the original contract of affreightment. *Hugg v. The Augusta Ins. Co.*; *Rosetto v. Gurney*.

In like manner the interruption of the voyage by an injury to the ship or cargo, will not justify an abandonment of the cargo if the goods can be forwarded with safety to life and health, and at a cost which bears a just proportion to their value; *Rosetto v. Gurney*; *Hugg v. The Augusta Ins. Co.*; *Peele v. The Protection Ins. Co.*, 14 Conn. 47; *Navone v. Hasson*, 9 C. B., N. S. 39; which, as the law is held in England, depends on whether the additional expense arising from the disaster equals the value of the property at the port of destination. *Hugg v. The Augusta Ins. Co.*; *Rosetto v. Gurney*; *Philpot v. Swan*, 11 C. B., N. S. 270; *Thwing v. The Washington Ins. Co.*, 10 Gray, 443, 462; *Lord v. The Neptune Ins. Co.*, *Ib.* 109; *Allen v. The M. M. Ins. Co.*, 46 Barb. 642; *Farnsworth v. Hyde*, 18 C. B., N. S. 835; 2 C. B. L. R. 234.

In like manner the question whether the vessel can and ought to be repaired, is solved in the English courts by a comparison of actual value with actual cost, and without the refinements which perplex the subject in this country. No injury can be constructively total, as the law is held in England, unless the circumstances preclude the possi-



bility of repairing it, or justify a refusal to incur the outlay which the remedy would involve; and minor losses are measured by the cost of the repairs or sacrifices necessary for the restoration of the property to its original condition.

A different method of computation is followed in the United States, under which a loss which equals or exceeds half of the value of the ship or cargo, is constructively total and a sufficient ground for an abandonment. This doctrine may be found in several of the earlier writers on insurance, and was transplanted from them into our own jurisprudence. Thus, Valin inclined to think that the insured were entitled to abandon goods or merchandise for a loss which exceeded half their value, notwithstanding the language of the ordinance of Louis XIV., which spoke of an entire loss of the effects covered by the insurance; and the dissent of Emerigon from this conclusion, was based on the ground that legislative enactments should be construed literally, and not on a denial of the general proposition stated by Valin; Emerigon, *Traites des Assurances*, c. 47, § 2; Valin, liv. 3, tit. 6, art. 46.

The rule seems to have originated in the idea that a loss which exceeds certain limits may be attended with consequences which are insusceptible of exact admeasurement or proof, and that justice is best administered under these circumstances by throwing the risk on the insurers.

Every injury to a ship which exceeds certain limits, must necessarily put an end to her usefulness for the time being as completely as if she were stranded or captured, and require a sacrifice of money and time to restore her to a state for active service. And as the cost for forwarding damaged goods is as great as if they were sound, and the profit at the port of destination necessarily less, the one may be inadequate to meet the other, and the adventure end in a loss to the parties interested. Hence, no doubt, the seemingly illogical conclusion that partial injuries, which exceed a certain proportion, should be compensated as if they amounted to a total loss. *The American Ins. Co. v. Ogden*, 20 Wend. 287, 300.

If, however, we recur to the definition of the word "impossible," given by Baron Maule, in *Moss v. Smith*, under which it becomes synonymous with impracticable, we shall find the difference between the English and American courts reduced to this, so far as the vessel is in question; that while both follow the same general principle, the former hold every loss reparable which falls short of the whole value, while the latter deem it virtually impracticable to repair injuries which exceed one-half. It is, in short, a difference not of principle, but as to the presumption or rule of evidence through which the principle should be applied.

From whatever cause the rule in question was followed by many of the

continental jurists; Valin, liv. 3, tit. 7, art. 46; Le Guidon, chap. 7, art. 6, and seemed at one period about to obtain a foothold in England, where it was adverted to, if not recognized, by judges of great authority. See *Hudson v. Harrison*, 3 Brod. & Bing. 97. Park on Insurance, 194; *Hamilton v. Mendes*, 2 Burrow, 1198. The point was not, however, actually determined, and no English tribunal would now recognize the validity of an abandonment grounded on an injury falling short of the whole value of the property at risk. A different result followed in the United States, where the courts deferred to the authority of Valin, and the exigencies of commerce in a country where capital was scarce and the rate of interest high; and it became settled at an early period that a loss which equals half the value of the property may be made total at the cost of an abandonment to the insurers (ante, 695). *Allen v. The Ins. Co.*, 1 Gray, 150; *Ludlow v. The Columbia Ins. Co.*, 1 Johnson, 535; *Vanderheuev v. The United States Ins. Co.*, Ib. 406. In *Ludlow v. The Columbia Ins. Co.*, Livingston, J., said that the cargo of a stranded vessel might be abandoned if injured to one-half its value, whether it could or could not be forwarded in specie to the port of destination, and the same rule was applied in *Vanderheuev v. The United States Ins. Co.*

A similar decision was made in *Gardner v. Smith*, 1 Johnson's Cases, 142, and the seizure of more than half the goods covered by a policy of insurance, by the officers of a foreign custom-house, held to be a constructive total loss of the whole, including those which had escaped confiscation. These cases establish that the total loss of half the property at risk, is equivalent to a partial loss or injury which extends to half the value of the whole; but it may be doubted whether this does not go beyond the true reason of the rule in question, and it is unquestionably at variance with the ordinance of Louis XIV., as interpreted by Valin, which did not permit those portions of the cargo which arrived in safety to be abandoned because the injury to the rest was equal to one-half of the whole value. Valin, tom. 2, liv. 3, art. 6.

The principle is the same when the ship is in question, except that the loss is to a greater extent than is practicable in the case of goods, measured by the expenditure necessary to repair the injury and restore the vessel to her former condition. *The Delaware Ins. Co. v. Winter*, 2 Wright, 176. The law was so held in *Smith v. Bell* (ante, 693), and the rule that an injury to the extent of one-half is constructively equivalent to the loss of the whole, said to grow out of the convenience of having a determinate and precise test, that would give certainty and uniformity, and obviate the necessity for inquiries which could not be pursued to a satisfactory conclusion. A similar view was taken in *Peters v. The Phoenix Ins. Co.*, 3 S. & R. 25, where Tilghman, C. J., said there was a marked distinction between an actual

total loss (by the sinking or burning of the ship) and that kind of loss which is total not in fact but in contemplation of law, viz.: when damage has been suffered during the voyage to the amount of fifty per cent. And he went on to add, that if the loss was over fifty per cent. the insured might abandon, if less than that proportion he could not. These decisions gave the rule which has not since been called in question. *Lincoln v. The Hope Ins. Co.*, 8 Gray, 22; *Abbott v. Broome*, 1 Caines, 292; *Center v. The American Ins. Co.*, 7 Cowen, 564; 4 Wendell, 45; *Dickey v. The New York Ins. Co.*, 3 Wend. 658, 662; *Deblois v. The Ocean Ins. Co.*, 16 Pick. 303; *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27; *Patapsco Ins. Co. v. Southgate*, 5 Peters, 601; *Bradlie v. Maryland Ins. Co.*, 12 Id. 378, 398; *The Cincinnati Ins. Co. v. Bakewell*, 6 B. Monroe, 341; *Robinson v. The Con. Ins. Co.*, 3 Sumner, 220; *Morton v. The Lexington F. L. & M. Ins. Co.*, 16 Illinois, 230.

The cost of saving a stranded vessel is not necessarily the sole criterion, for if it be in a high degree doubtful whether the attempt to get her off will succeed, the owner is not bound to incur a certain outlay for an uncertain good, and may throw the risk on the insurers by abandoning. And so if the means of rescuing the vessel are not at hand, and her position is one of so much peril that she will in all probability perish before they can be procured. *Peele v. The Ins. Co.*, 3 Mason, 27; *The Brig Sarah Ann*, 2 Story, 206; 13 Peters, 287; *Norton v. The Lexington M. & F. Ins. Co.*, 16 Illinois, 247 (ante, 686). Such at least are the decisions in the courts of the United States, although a different rule prevails in Massachusetts, under which the validity of an abandonment depends on the actual condition of the vessel as disclosed by the event (ante, 687).

In like manner if the master is not in funds, and cannot procure them on the credit of the owners or by hypothecating the vessel, and the circumstances are not such as to admit of delay, the necessity of the case will justify a sale and abandonment, although the injury might be repaired for less than half the value if the requisite means were at hand. *Center v. The American Ins. Co.*; *Dickey v. The American Ins. Co.*, 2 Arnould on Insurance, 1083. And the case is even stronger when it is impracticable to repair the vessel from a want of the necessary materials. *Dickey v. The American Ins. Co.*

It has been said in like manner that when the voyage is broken up and the cargo cannot be sent to its destination, without an additional expense equalling half the amount due on the charter party or bill of lading, the insured may treat the loss of freight as total, and abandon to the insurers, *Wheaton v. The New York Ins. Co.*, 18 Johnson, 208; *Center v. Am. Ins. Co.*, 7 Cowen, 456; 4 Wend. 45. The cost of repairing the vessel or warehousing and drying the goods, must, however, as it would seem, be laid out of view in making this estimate as not being

freight, nor chargeable in account as such between the shipper and ship owner; *Lord v. Neptune Ins. Co.*, 10 Gray, 112, 125. Such at least is the well settled doctrine in England; *Mordy v. Jones*, 4 B. & C. 394; *Moss v. Smith*, 9 C. B. 94; *Philpot v. Swan*, 11 C. B., N. S. 270; and the courts of this country would probably follow the same rule, notwithstanding the criticism on *Mordy v. Jones*, in 2 Phillips on Ins. 1142. See *Lord v. The Neptune Ins. Co.* In *Philpot v. Swann*, Willes, J., treated it as well established under *Moss v. Smith*, that freight is not lost by the perils of the sea, simply because the goods have sustained sea damage, and cannot be put in a condition to be forwarded without an expenditure greater than the amount of the freight.

In *Lord v. The Neptune Ins. Co.*, the vessel was compelled to put back to the port of departure by a storm, where the goods which had been damaged to more than their value, and could not have been forwarded without drying them, and other measures that would have taken several months, were, in consequence of the refusal of the shipper to accept them, or direct what should be done, sold by the master to the highest bidder. The court held that even if the sale was authorized by the circumstances and beneficial to all the parties interested, there was still no loss of freight for which the insurers were liable, on any of the goods which remained and might have been forwarded in specie to their destination. It would seem to be settled under this and the previous decisions, that while a constructive total loss of the vessel by injuries equalling half the value will be a total loss of freight, a constructive total loss of the cargo will not, because the contract of affreightment still remains, and the ship owner may entitle himself to compensation, by carrying the goods to their destination, and tendering them to the consignee. *Lord v. The Neptune Ins. Co.*; *Henderson v. The Maid of Orleans*, 12 Louisiana, Ann, 352.

It has been repeatedly held that the deterioration of the cargo by external or intrinsic causes does not dissolve the contract of affreightment, even when it renders the voyage not worth pursuing by reducing the value of the goods below what it will cost to carry them to the place of destination. It will neither therefore justify the ship owner in refusing to proceed with the voyage, nor a refusal by the shipper to pay the freight, on the ground that the goods are valueless, and no benefit has been conferred. *Lord v. The Neptune Ins. Co.*; *Herbert v. Hallett*, 3 Johnson's Cases, 931. The contract of the ship owner is to use due care and diligence to transport the goods to their destination, and not that they shall be worth having when there. A deterioration of the goods through the perils of the navigation constituting a constructive total loss of the cargo, and justifying an abandonment, will not therefore be a constructive total loss of freight,

unless the voyage is defeated or so much of the cargo destroyed that the compensation for the carriage of the residue will not equal one-half of the amount that would have been payable on the whole. *Griswold v. The New York Ins. Co.*, 1 Johnson, 294; *Sallus v. The Ocean Ins. Co.*, 14 Id. 138; *Jordan v. The Warren Ins. Co.*, 1 Story, 342; *Hugg v. The Augusta Ins. Co.*, 7 Howard, 395; *Ogden v. The General M. Ins. Co.*, 2 Duer, 204.

It has, however, been held, that while the master is not bound to wait until goods which have received sea damage can be landed, dried and reshipped, he ought not to carry them forward in their wet condition, with a moral certainty that they will decompose or spoil during the voyage. *Notara v. Henderson*, 5 Q. B. L. R. 346. If the shipper is not at hand or will not give directions, the proper course is to land the goods at the intermediate port, and sell them publicly to the highest bidder. Under these circumstances the ship owner would agreeably to the authorities in the United States, be entitled to pro rata freight. If, as the case of *Vleierboom v. Chapman*, 13 M. & W. 230, decides, this cannot be claimed in England, there is a total loss of freight, for which the insurers should be answerable.

The tendency of the authorities is to limit rather than enlarge a doctrine which is admitted to be at variance with the letter and spirit of a contract designed to afford indemnity against actual loss. *Ritchie v. The United States Insurance Co.*, 5 S. & R. 501; *Deblois v. The Ocean Insurance Co.*, 16 Pick. 303; *Orrok v. The Commonwealth Insurance Co.*, 21 Id. 456, 470. In *The American Insurance Co. v. Ogden*, 15 Wend. 532, 537; 20 Id., Savage, C. J., observed that it was difficult to see how a partial injury should, under such a contract, authorize a recovery for a total loss; while the chancellor remarked, in the Court of Errors, that the rule did not obtain in England, and had been adopted in the United States as a fixed, though arbitrary, standard for measuring damages, which might otherwise be too uncertain for liquidation.

It seems, accordingly, to be inapplicable, unless the injury to the ship or cargo is attended with an entire failure of the voyage so far as it regards the property insured. In *Seton v. The Delaware Insurance Co.*, 2 W. C. C. R. 173, the confiscation of more than half the cargo was held not to justify the abandonment of the residue, which arrived in safety, although an injury of fifty per cent. to the whole might have been constructively total. It was held in like manner in a recent case in Massachusetts, on the authority of this decision, that the rule authorizing an abandonment for losses equalling half the value, applies where the voyage is defeated, or the whole cargo damaged by the perils of the navigation, and will not warrant the abandonment of goods which have arrived in safety, on the ground that others were

destroyed or injured while the risk still continued, because there is in such cases an exact measure of the loss, and arbitrary presumptions should not be indulged. *Forbes v. The Manufacturers' Insurance Co.*, 1 Gray, 504.

In *Parage v. Dale*, 3 Johnson's Cases, 456, the question arose with reference to the vessel, and Radcliff, J., who delivered the opinion of the court, said, that he knew of no case where the insured could abandon, after the voyage had been performed, because the object of the insurance has then been obtained, and there is no reason for carrying the loss beyond the actual amount of the injury. The soundness of this reasoning will be apparent, if we reflect, that if the insurers contract that the ship shall not be injured during the continuance of the voyage, as well as that she shall not be disabled from completing it, the latter stipulation is fulfilled by her safe arrival, and the recovery on the former should be limited to the actual loss. This case was cited and followed in *Pezant v. The National Insurance Co.*, 15 Wend. 453; and the rule in New York said to be, that the arrival of the vessel at her destination will preclude the right to abandon, even when it might have been exercised at an antecedent period, unless the injury is such as to render her worthless, or insusceptible of being rendered fit for navigation. This conclusion is sustained by the opinion of Mr. Marshall, in his Treatise on Insurance, with regard to the effect of the completion of the voyage on the right to abandon for an injury, either to the ship or cargo; Marshall on Insurance, 486; and by the language of Parsons, in *Wood v. The Lincoln and Kennebeck Insurance Co.*, where the arrival of the vessel at her destined port was said to be a reason for refusing a recovery for a total loss (ante, 697).

In like manner when the vessel is actually repaired, although at a cost which exceeds half her value, there is a certain measure of the loss, and the insured cannot recover more or abandon subsequently to the insurers. *Ritchie v. The United States Insurance Co.*, 5 S. & R. 501; *Humphrey v. The Union Insurance Co.*, 3 Mason, 429; *Dickey v. The Union Insurance Co.*, 4 Cowen, 222; 3 Wend. 658; *Depau v. The Ocean Insurance Co.*, 5 Cowen, 63.

In these instances the vessel was refitted before the abandonment; but in *Hart v. The Delaware Insurance Co.*, 2 W. C. C. R. 346, it was held to follow from the same principle, that if the insurers agree to be answerable for the cost of repairing an injury which exceeds half the value, the insured cannot justly ask for more, and are not entitled to abandon. This decision was approved in *Ritchie v. The United States Insurance Co.*, 5 S. & R. 501; and it was said to be a necessary consequence that if the vessel is repaired with money belonging to the insurers or at their expense, the indemnity is complete, and no recovery can be had upon the policy. "It has been argued," said Chief Justice

Tilghman, "on the part of the plaintiff, that although the ability of the schooner to proceed to Corunna, was restored by the repairs at Plymouth, yet he had a right to abandon her, and resort to the defendants, because these repairs, with other expenses connected with them, amounted to more than half the value of the vessel. It is the inclination of this court, so far as is consistent with former decisions, to confine the contract of insurance to its true intent, which is to obtain an indemnity in case of loss, but not to be put in a better condition in consequence of loss. It will be desirable, therefore, to ascertain the actual loss, and give a compensation for it, in all cases where it can be done, without unsettling principles which have been fixed. That the insured may abandon, where the damage exceeds one half of the value of the ship, is a general principle, subject, however, to exceptions. If the insurer will undertake to repair the damage, though exceeding one half the value, he may do it, and the insured shall not abandon; because, if his ship be repaired, it is all he has a right to demand, and more or less of cost is immaterial to him. This is quite reasonable, and was decided by the Circuit Court of the United States for the district of Pennsylvania, in *Hart v. The Delaware Insurance Company*. Now, in the case before us, whatever may have been the amount of the damage (a question not without considerable difficulty), it was repaired at the expense of the defendants, before the plaintiff gave notice to abandon. I say at the expense of the defendants, because, there having been, without question, a total loss on the cargo, which the defendants have paid, the proceeds of its sale in England, part of which were applied to the repairs of the schooner, belonged to them. This seems to bring the case within the exception which I have mentioned; for whether the defendants undertook to make the necessary repairs or the repairs were made with their money, without their undertaking, is immaterial. When the plaintiff gave notice of abandonment, he did not know precisely in what condition the vessel was; he did not know that she had been restored; he did not know the probable amount of damage. Even if the damages had not been repaired at that time, he afforded the defendants no opportunity of making an offer to repair them: the only notice he gave them was, that he should abandon, because of the capture, by which the voyage was broken up and destroyed. It was not, from anything that appears, until the schooner's arrival at Boston, in the month of August, with passengers, that all the circumstances which occurred during her stay in England, were made known, either to the plaintiff or the defendants. On her arrival, she was at the disposal of the plaintiff, together with the freight which she had earned on her homeward voyage. Why, then, should the plaintiff be permitted to throw her on the defendants, by converting into an artificial total loss, that, which in its nature was but partial. I can see

no propriety in it, and am, therefore, of opinion, that the loss is not to be considered as total."

It results from what is here said, that when a claim for a total loss is based on the assumption that the injury to the vessel is irreparable, or that she cannot be extricated from the peril in which she is involved, the insurers may demonstrate the fallacy of the allegation by taking the ship into their own hands, and rendering her fit for service within a reasonable time. It might seem to be a necessary inference from these premises and the reasoning of C. J. Tilghman, in *Ritchie v. The U. S. Ins. Co.*, that the effect of such a restoration of the property should be independent of the cost. But the courts of Massachusetts stop short of this conclusion; and the success of the insurers in repairing the vessel, or bringing her to a place of safety, will not defeat a prior abandonment unless the expense is less than one-half of the value after deducting one-third new for old.

The doctrine of *Wood v. The Lincoln and Kennebeck Ins. Co.*, is not recognized in the courts of the United States, which hold that the insurers cannot substitute indemnity for compensation, or resist a claim for a total loss by restoring the ship to her former condition. If an abandonment is justified by the actual condition of the vessel, it confers vested rights which cannot be defeated by a subsequent event. The insurers have no authority in the premises except through the insured, and cannot take possession of the property without losing the right to contest the validity of the act by which it was transferred. The law was so held in *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27; and the rule enunciated by Story, J., on that occasion, prevails in some of the State tribunals, and in the Supreme Court of the United States. *The Columbian Ins. Co. v. Ashby*, 4 Peters, 139; *The Cincinnati Ins. Co. v. Bakewell*, 4 B. Monroe, 541. It was said in *The Ins. Co. v. Ashby*, that if the repair of the vessel by the insurers, or an offer to bear the expense of repairing her could preclude the insured from abandoning which the court refrained from deciding, it would not defeat a prior abandonment made on grounds which were valid at the time. It was held in like manner in *The Cincinnati Ins. Co. v. Bakewell*, that there was nothing in the question whether an injury to the ship or cargo should be regarded as a total loss, which unfitted it for judicial investigation, or made it requisite that the test of actual experiment should be applied. If it appeared from the evidence that repairs could not be made, or not without an expense which exceeded half the value, the loss would be total; otherwise merely partial. The insurers could not take possession of the vessel even for the purpose of demonstrating the actual cost by trial, without a ratification of the abandonment, which would preclude them



from contesting it subsequently, even when the result was to show that it was made on insufficient grounds.

In *The Ins. Co. v. Goodman*, 32 Alabama, 108, it was decided in accordance with this principle, that when the cost of raising and repairing a sunken vessel will, in the opinion of competent and experienced men, exceed half her value, the loss will be constructively total, and the insurers cannot defeat an abandonment made on such grounds, by weighing and repairing the ship for less than fifty per cent. of what she is worth. The same result would apparently have been reached in *Norton v. The Lexington F. and M. Ins. Co.*, 16 Ill. 235, 248, but for a clause authorizing the insurers to take possession of the property, and repair it for the account and benefit of the insured. And when the question arose in *Younger v. The Gloucester Ins. Co.*, 1 Sprague 236, the court held, that although the insurers might, under a proviso that the acts of the insured or insurers, in recovering, saving, or preserving the property, should not be considered as a waiver or acceptance of an abandonment, bring the vessel home, they could not keep her for six weeks after she arrived, even for the purpose of making full repairs, without losing the right to show that the abandonment was invalid when originally made.

Notwithstanding these authorities the doctrine of *Wood v. The Lincoln and Kennebeck Ins. Co.* is still followed in Massachusetts with some modifications suggested by the subsequent course of decision. *The Commonwealth Ins. Co. v. Chase*, 20 Pick. 142. In *Peele v. The Suffolk Ins. Co.*, 7 Pick. 204, it was said that the validity of an abandonment depends on the condition of the property at the time. The insurers should not therefore be denied the privilege of showing what that is, at their own expense. If the injury, as demonstrated by the result of the experiment, is less than half the value, the abandonment will stand, if less it must be deemed invalid. And the doctrine of *Wood v. The Lincoln and Kennebeck Ins. Co.* was upheld as more consistent with the true theory of the contract of insurance than that prevailing in the tribunals of the United States. *Dobbins v. The Ocean Ins. Co.*, 16 Pick. 203; *Reynolds v. The Ocean Ins. Co.*, 22 Id. 191; 1 Metcalf, 160.

Under these decisions the reparation of the vessel by the insurers does not take effect as a satisfaction or performance of their covenant to indemnify the insured (ante, 698); Valin Liv. 3d tit. art. 6, 46, and is a mere criterion of the nature and extent of the loss. It can make no difference in this aspect of the case whether the test is applied by the underwriters or by a third person acting in his own behalf. In *Kemp v. Halliday*, 1 Q. B. L. R. 520, a vessel which had been sunk in deep water, and could not be raised according to the report of the surveyor employed by the owners without a disproportionate expense, was

abandoned by them to the insurers. But as it appeared that she had subsequently been weighed through the unauthorized intervention of a stranger, at a cost which, after deducting the amount contributed by the cargo, as a general average, was less than she was worth, the abandonment was held invalid.

We have seen that the difference between the courts of the United States and those of Massachusetts is in some respects fundamental; the former holding that the insured is to act not on certainties but probabilities; *Graham v. Ledda*, 17 Louisiana, Ann. 45; *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27, 61; the latter that the right of abandonment depends on the condition of the vessel as disclosed by the event or the result of the efforts made to rescue her from peril. *Hall v. The Ocean Ins. Co.*, 9 Pick. 466; *Deblois v. The Ocean Ins. Co.*, 16 Id. 303, 311. The difficulty seems to be in the nature of a case which does not admit of a rule meeting all contingencies. If the decision is to turn on the inferences which should or ought to have been drawn while the result was still uncertain, a doubtful question of fact will arise depending on the opinion of experts, and which is not likely to be determined with impartiality by a jury. If the event is made the criterion, acts done in good faith for the benefit of all concerned may become invalid through the operation of causes that could not be anticipated (*ante*, 686).

In determining whether a vessel which has been wrecked or stranded shall be sold, the master must necessarily be governed by the prospect of rescuing her from the danger in which she is involved; *The Brig Sarah Ann*, 2 Sumner, 206; 13 Peters, 387, and when a sale based on necessity would be valid, the insured is generally if not always entitled to abandon. In *Fontaine v. The Phoenix Insurance Co.*, 11 Johnson, 293, Kent, C. J., said, that when the condition of the vessel appears desperate, she may be sold by the master, and abandoned by the insured, and that the subsequent good fortune of the purchaser, in extricating her from peril, will not defeat the vested right which has accrued; while Story, J., observed, in the case of the *Ship Fortitude*, 3 Sumner, 228, 254, that a sale by the master, can only be justified by urgent necessity, but that if such necessity exists at the time and on the spot, the sale will be valid, although subsequent events show that a different course might have been pursued successfully.

The intervention of the insurers to repair or save the vessel requires the utmost diligence, and they will be precluded from disputing the validity of the abandonment by an unreasonable delay. *Peele v. The Suffolk Ins. Co.*, 7 Pick. 204. It will make no difference in the application of this principle that the vessel is finally restored to the owners in a condition for immediate use, and at an expense which falls short of the value. *Reynolds v. The Ocean Ins. Co.*, 22 Pick. 191; 1 Metcalf,

160. The assumption on which the abandonment was based may be disproved, but the insurers cannot set aside an act which they have constructively ratified by their laches. Even when the policy authorizes the insurers to repair the vessel for the account and benefit of the insured, they will still be bound to diligence, and may be precluded from contesting the abandonment by delay. *Lexington v. The M. Ins. Co.*, 16 Illinois, 235.

The same question arose in *Copelin v. The Insurance Company*, 9 Wallace, 465, and was decided on the same principles. It is well settled, said Strong, J., "that an offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences. And an acceptance need not be expressly made. It may even be refused, and yet the insurers, by their conduct, may make themselves liable as for a total loss. Though, by the terms of the policy, these defendants had a right to take possession of the boat, and repair her for account of the plaintiff, yet this was a privilege accorded to them only, that they might thus make indemnity for the loss. Taking possession to make partial repairs, not amounting to indemnity, was not contemplated by the contract. It was not authorized. Nor did the contract warrant taking possession of the boat, and holding her for an unreasonable time. The insurers were bound to repair and return without unnecessary delay. In holding longer than was necessary for making repairs, they must be regarded as acting, not as insurers, but as owners, for they had no other authority than that of owners for their failure to return within a reasonable time. Their action was, therefore, a substantial recognition and acceptance of the abandonment of which they had been notified, for in no other way had they become owners. On no other theory can this delay be considered lawful. It is true the policy stipulated that the acts of the insurers in preserving, securing, or saving the property insured in case of danger or disaster, should not be considered or held in acceptance of abandonment, but this manifestly refers only to authorized acts; retaining possession an unreasonable time, and then offering to return her unrepaired, were not authorized acts, and consequently they are unaffected by the stipulation. They must, therefore, be regarded as constructive acceptance of the abandonment. This is a principle asserted and well sustained by the authorities. In *Peele v. The Suffolk Ins. Co.*, where the jury had found that the underwriters, who had taken possession of the stranded vessel, had not offered to restore her in a reasonable time, the court said, the underwriter has his duties as well as his rights. If he take the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage, if not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship,

and must be considered as taking her to himself under the offer to abandon. The principle, said the court, rests upon the very nature of the law of insurance, which is a fair and honest indemnity for loss."

"The same doctrine was asserted in *Reynolds v. The Ocean Insurance Company*, and it was also held that the underwriter's duty and liability in such a case, are not varied by a clause in the policy of insurance, stipulating that the acts of the assurers in recovering, saving, and preserving the property insured in case of disaster shall not be considered an acceptance of an abandonment. Such, also, was the ruling in a case between the same parties, in *Norton v. The Lexington F., L. & M. Ins. Co.* It is in our judgment sustained by sound reason."

Looking at the question as one of principle, there would seem to be no doubt that the insurers may provide for the safety of the property, where no adequate measures are taken for the purpose by the insured. *Griswold v. The New York Ins. Co.*, 1 Johnson, 205; Valin Liv. 3 tit. 6 art. 46, 51. Emerigon *Traité des Assurances*, ch. 17, sect. 7. This is an equity arising from the nature of a contract, which throws the risk on them. And as it exists independently of any grant or cession by the insured, there would seem to be no sufficient reason why the exercise of it should be a ratification of an abandonment made on insufficient grounds. *Savage v. The Commercial Exchange Ins. Co.*, 4 Bosworth, 1. In this instance the insurers were held not to be precluded from disputing an invalid abandonment, by using means to preserve the property which had been thrown on their hands. The ordinance of Louis XIV., provided that the insured might labor for the preservation or recovery of the ship and cargo, without prejudice to a contemporaneous or subsequent abandonment, and the existence of such a right on the part of the insurers was generally recognized. Valin, liv. 3, tit. 6, art. 45, 46, 51; Emerigon *Traité des Assurances*, chap. 17, sect. 7. It was the duty of the insured, according to these authorities, to give such seasonable notice of the loss, as would enable the insurers to protect themselves and the property at risk. Emerigon differed from Valin in holding that an abandonment, which was valid under existing circumstances, could not be defeated by subsequent events, and would even seem to have thought that a loss by capture does not cease to be total on the subsequent liberation of the vessel. Emerigon chap. 12, sect. 22, chap. 17, sect. 246. But both commentators seem to have agreed that the insurers might show that there was no sufficient ground for an abandonment, by forwarding the goods to their destination, or repairing the vessel, Valin, liv. 6, tit. 3, art. 46.

The right of abandonment depends on the ratio of the injury to the value of the property at risk. The one is ascertained in England by the market price, when the vessel is in question; the other by the cost of making such repairs as would render her fit for navigation. *Bradlie*

v. *The Maryland Ins. Co.*, 12 Peters, 378; *Allen v. Sugrue*, 8 B. & C. 561; *Young v. Turing*, 2 M. & G. 593; *Manning v. Irving*, 1 C. B., 168; 2 Id. 784; 6 Id. 391; 1 Clarke & Finelly, N. S. 287. The subject was laboriously investigated in *Manning v. Irving*, where the judgment of the Common Pleas, in favor of the insured, which had been affirmed in the Exchequer Chamber, was carried by a writ of error to the House of Lords, and the point submitted to the judges who were unanimously of opinion, that the valuation refers to the amount of compensation due to the insured from the insurer, after the loss is adjusted, and has nothing to do with the adjustment of the loss, which was said to depend on the ratio between the injury and the real value. This view was adopted by the lords, on the motion of the chancellor, seconded by Lord Campbell, who congratulated the House on the settlement of a question, which had agitated Westminster Hall for thirty years. "In an open policy," said Mr. Justice Pattison, who delivered the answer of his brethren, "the assured would have been entitled to recover for a total loss, the amount to be ascertained by evidence.

"What difference, then, arises from the circumstance, that the policy is a valued policy.

"By the terms of it, the ship, &c., for so much as concerns the assured, by agreement between the assured and assurers, are and shall be rated at £17,500; and the question turned upon the meaning of these words. Do they, as contended for by the plaintiff in error, amount to an agreement, that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises, whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired?

"Or do they mean only, that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the quantum of the assured's interest?

"We are all of opinion, that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies. In the case of *Lewis v. Rucker*, on a valued policy on goods, the amount to which the underwriter was held liable for a partial loss, was ascertained, by computing such a proportion of the value in the policy as the difference between the price for which sound goods would have sold, at the port of delivery, and that for which the damaged goods actually sold, bore to the price for which sound goods would have sold. So that, in estimating the extent of the loss, that is, in determining whether it was a loss to the extent of one-half, one-third, or to any other extent, the value in the policy was wholly disregarded, and nothing was con-

sidered, but the state of the goods, as ascertained by their selling prices. If sound goods would have brought double the price of the damaged, the loss was one-half, or fifty per cent., whatever the value in the policy might be. But the extent and nature of the loss being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy; and this mode of treating partial losses on goods is always adhered to. Now the question, whether a loss is total or partial, is a question of the same nature as the question, what is the extent of a partial loss? and there is the same reason in both cases for excluding the consideration of the value in the policy from the inquiry as to the extent of the loss, and for treating that value as binding on the question of, how much the subject so totally or partially lost was worth; so that the mode of determining the question, whether the loss was total or not, which has been adopted in this case, agrees, in so far as it excludes the consideration of the value in the policy, with that in which the inquiry into the extent of a partial loss on goods is always conducted. Such has been the construction put upon valued policies in the cases which are questioned in this writ of error. *Allen v. Sugrue*; *Young v. Turing*, and *Egginton v. Lawson*, 1832; and *Herne & Hay*, 1842, cited by Sir F. Thesiger. Those cases have now been considered for many years, as having settled the law, and have been the basis on which contracts without number have been formed, and they ought not, on slight grounds, to be departed from. The principle laid down in these latter cases is this: that the question of loss, whether total or not, is to be determined just as if there was no policy at all; and the established mode of putting the question, when it is alleged that there had been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done, in the state in which the vessel was placed by the perils insured against.

"If he would not have repaired the vessel, it is deemed to be lost.

"When this test has been applied, and the nature of the loss has been thus determined, the quantum of compensation is then to be fixed.

"In an open policy, the compensation must be then ascertained by evidence.

"In a valued one, the agreed total value is conclusive; each party has conclusively admitted, that this fixed sum shall be that which the assured is entitled to receive in case of total loss.

"It is argued, that this course of proceeding infringes on the generally received rule, that an insurance is a mere contract of indemnity, for thus the assured may obtain more than a compensation for his loss; and it is so.

"A policy of assurance is not a perfect contract of indemnity. It

must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify."

A different rule prevails in New York and Massachusetts. It was held in *Smith v. Bell* (ante), overruling *Depau v. The Mutual Ins. Co.*, 3 Johnson's Cases, 182, that the deduction of one-third new for old which prevails in the case of average losses, should also be made in determining whether the injury is constructively total as equalling half the value of the vessel. This decision is followed by the courts of New York. *Dickey v. The American Ins. Co.*, 4 Cowen, 222, 225; 3 Wend. 658; *Center v. The Am. Ins. Co.*, 4 Wend. 45; *Fiedler v. The N. Y. Ins. Co.*, 6 Duetr, 282. And the rule is the same in Massachusetts whether the question is as to the amount due for an average, or the existence of a constructive total loss. *Sewall v. The U. S. Ins. Co.*, 11 Pick. 90; *Deblois v. The Ocean. Ins. Co.*, 16 Id. 303; *Lincoln v. The Hope Ins. Co.*, 8 Gray, 2d.

This would seem a necessary consequence of the deduction of one-third new for old, in the adjustment of losses which are merely partial. For as such an abatement implies that the vessel which has been repaired is to the extent of one-third of the cost better than she was before, it must apply whether she is rebuilt altogether or only in part; or to state the argument somewhat differently, as the deduction is based on the assumption that the value is enhanced to the extent of one-third of the repairs, so one-third ought to be deducted from the expense of the repairs in estimating the injury (ante, 692). It has indeed been said that although the substitution of new masts or rigging, or the exchange of an old plank or beam for a new one, may render the ship more valuable, this ceases to be true when the injury is more extensive and equals half the value. Under these circumstances, the frame work of the vessel is sometimes dislocated, and she may be less strong and seaworthy after the repairs are made than she was originally. When the existence of such a defect is established it may be taken into the account as one of the items going to make up a total loss; but it should not be taken for granted without proof. It has accordingly been held in Massachusetts, that a vessel which has been thoroughly repaired must be taken to be worth as much as she was before the loss, unless precise and adequate evidence is adduced to the contrary. In *Peele v. The Suffolk Ins. Co.* 7 Pick, 244, the court said that a general strain of the vessel could not be taken as one of the elements going to make up a total loss, unless established rigorously by proof; and in *Orrock v. The Commonwealth Ins. Co.*, 4 Pick. 456, a witness was refused permission to state that a ship was less valuable after being repaired than before, and the measure of the injury said to be the outlay requisite to replace what

has been damaged with sound material. In *Sage v. The Middletown Ins. Co.*, 1 Conn. 230, such evidence was held to be inadmissible from the opening which it would give to loose and partial testimony, and the danger of an erroneous verdict if it were laid before the jury.

The injury arising from a partial rupture or dislocation of the frame of the vessel, may, however, be a just ground of recovery, either for an average, or as going to make up a total loss, and the point was so determined in *Giles v. The Eagle Ins. Co.*, 2 Metcalf, 140.

The deduction of one-third from the cost of repairs, renders the rule that a loss of 50 per cent. is constructively total, less unfavorable to the insurers than it might at first sight appear. For as one-third is deducted in estimating the injury, the insured cannot abandon, unless the cost of repairing the vessel would be three-fourths of her value, as estimated in the policy. Thus in *Ficellor v. The New York Ins. Co.*, the court held that where the cost of repairs was, after deducting one-third new for old \$8,000, while the vessel was valued at \$16,000, the loss must be regarded as merely partial. Thus interpreted the law of the United States coincides with that of France, under which losses exceeding three-fourths of the value of the property are constructively total, and may be made the ground of an abandonment to the insurers. Code de commerce, tit. 10, art. 369. Pardessus Cours de droit, vol. 2, 399. *Dickey v. The American Ins. Co.*, 3 Wend. 658.

The deduction is, however, only made in the case of injuries to the hull or rigging which are susceptible of being repaired, and does not apply to the expense incurred in weighing a submerged or stranded vessel, and bringing her to a place of safety; *Sevell v. The United States Ins. Co.*, 11 Pick. 96; nor when the question is, whether the ratio between loss and value is such as to authorize an abandonment under a policy on goods.

The value of the property at risk is determined in England according to the same principles, whether the question arises on an open or a valued policy. If the insurance is on the ship, the price which she would bring when repaired, is taken as the standard; if on goods, the prime cost at the point of departure. And the valuation in the policy is regarded merely as a measure of the compensation to be paid by the insurers in the nature of a liquidation of the damages.

In New York and Massachusetts, on the other hand, the valuation in the policy is the standard for all the purposes for which value can be drawn in question between the insurers and the insured, and it is said to be unjust and partial to determine the nature and extent of the loss by one criterion, and ascertain the amount of the indemnity by another. The law has been so held in numerous instances in Massachusetts; *Deblois v. The Ocean Ins. Co.*, 16 Pick. 303; *Orrok v. The*



*Comm'th Ins. Co.*, 21 Id. 467; *Allen v. The Commercial Ins. Co.*, 1 Gray, 154; and would appear to be equally well settled in New York. *Center v. The American Ins. Co.*, 7 Cowen, 564, 4 Wend. 45; *The American Ins. Co. v. Ogden*, 20 Wend. 207; *Fiedler v. The New York Ins. Co.*, 6 Duer, 282. On the other hand, in *Peele v. The Merchants' Ins. Co.* (ante, 684), Story, J., adhered to the English rule on this point as well as on that of the deduction to be made for new materials. The valuation in the policy was said to be the standard fixed by agreement for assessing the damages after the nature and extent of the injury had been ascertained. It was, therefore, inapplicable to the question whether the loss was entire or merely partial. One-third might justly be deducted when repairs were made and the insured had the benefit of the new materials, but there was no ground for such an abatement when the vessel was abandoned to the underwriters. The same rule was applied in *Bradlie v. The Maryland Ins. Co.*, 12 Peters, 378, and declared to be in harmony with the English authorities and the true interpretation of the contract.

The opinion of the court was delivered by Story, J., who said, that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constituted no ingredient in ascertaining whether the injury by the disaster was more than one-half the value of the vessel. For a like reason, the ordinary deduction in cases of a partial loss, of one-third new for old, from the repairs, was equally inapplicable to cases of a technical total loss, by an injury exceeding one-half of the value of the vessel. That rule supposed the vessel to be repaired and returned to the owner; who received a corresponding benefit from the repairs beyond his loss, to the amount of one-third. But in the case of a total loss, the owner received no such benefit, the vessel did not come back to him, but was transferred to the underwriters. If the actual cost of her repairs exceeded one-half her value after the repairs were made, then the case fell directly within the predicament of the doctrine asserted in the case of *The Patapsco Ins. Co. v. Southgate*, 5 Peters, 604. The limitations of the rule, and the reason of it, were very accurately laid down by Mr. Chancellor Kent in his Commentaries, 3 vol. 330, and in *Da Costa v. Newnham*, 2 Term Rep. 407.

The doctrine of *Peele v. The Merchants' Ins. Co.*, is also sustained on both these points by *Cohen v. The Charleston F. & M. Ins. Co.*, Dudley, 147, and *The Ins. Co. v. Goodman*, 32 Alabama, 108; and it was applied in *Robinson v. The Comm'th Ins. Co.*, 3 Sumner, 220, to a policy which had been executed in Massachusetts, notwithstanding the objection that the *lex loci contractus* should prevail as laid down by the courts of the State, which was met by the reply that such contracts

were governed by the commercial law, which is presumably the same throughout the Union.

This conflict of decision has been noticed with regret by the courts of Massachusetts, but they adhere firmly to the doctrine that one-third is to be deducted from the cost of repairs in ascertaining the injury, and the valuation in the policy taken as the measure of value in all that regards the vessel. The result is that a plaintiff who could not make out his case in a State court, may recover without difficulty in a Federal tribunal sitting in the same Territory and professing to be governed by the same principles. If a ship worth \$10,000, and valued at \$12,000, is so much injured that it will cost \$6,000 to repair her, the owner will be told by the Supreme Court of Massachusetts that there is an average loss of one-third, and by the Circuit Court of the United States that he is entitled to the whole amount fixed by the valuation.

The balance of good sense and convenience inclines to the view taken in New York and Massachusetts. The contract of insurance is one of indemnity not profit. It cannot properly be used as an instrument of gain. Yet the inevitable tendency of assessing the damages by an arbitrary standard, and taking the real value as the measure of the injury, is to raise the compensation above the loss. Interest, which C. J. Marshall declared to be the only safeguard of the insurer, *The Columbia Ins. Co. v. Lavrance*, 2 Peters, 20, is thus thrown into the opposite scale. The insured have no motive to preserve the property, and are gainers if it is destroyed. This is not the only injurious influence of the doctrine of the Supreme Court of the United States. The insured cannot repair the vessel without losing the right to abandon, nor the insurers without conceding that the abandonment is valid. The parties who should care for the safety of the ship and cargo are thus obliged to stand aloof. It has been said that the insurers should see to it that the ship is not overvalued. This might be a sufficient answer if the community were not interested in the items which make up the aggregate of national wealth, and did not lose when property is needlessly sacrificed. The argument, *ab inconvenienti*, is, therefore, in favor of restricting the rule which makes a loss of 50 per cent. constructively total. In *Deblois v. The Ocean Ins. Co.*, Putnam, J., said: "Judges will, no doubt, be influenced by the consideration, whether an abandonment, for technical total losses, ought to be favored or restricted. We are among those who think, that this part of the law of insurance, as it now is administered, is a clear departure from the great principle of indemnity, upon which the contract of insurance should rest. According to the original intent, surely, the underwriters were to pay the actual loss. They were not to become ship-owners, brokers or mer-

chants. This idea was expressed by Buller, J., one of the most eminent judges of England, about fifty years ago. *Mitchell v. Edie*, 1 T. R. 615. We must decide the law as we now find it. But where a construction is to be made in the absence of binding authority, we prefer that which restrains, rather than that which enlarges, the right to make a technical total loss. According to our rule, no injury will be done to the assured. He will have his indemnity for the actual loss, according to the established principles of insurance."

"We hope that, in this State, it will be considered as settled, that the value in the policy is to govern, and that a deduction of one-third new, for old, is to be made in regard to partial losses. If, after such reduction, the expenses of repairs exceed one-half the value in the policy, the assured may abandon, and claim as for a total loss, otherwise he is to keep the ship, and recover for a partial loss only."

The rule that an injury of fifty per cent. is total, is, to a great extent, reversed by these decisions, and it may preclude the right of abandonment in cases where the loss would equal the whole value, agreeably to the method of computation pursued in England. If one-third had been deducted in *Manning v. Irving*, from the £10,500, which, by the special verdict, were necessary to repair the vessel, the remainder would have been less than one-half the sum of £17,500, at which she was valued in the policy. The injury would therefore have been merely partial in Massachusetts and New York. But as no such deduction is made in England, and the vessel would only have been worth £9,500 when repaired, the loss was held to be constructively total. The same remark applies to *Allen v. Sugrue*, where the insured recovered £2,000, on a vessel valued at that sum, although the cost of repairs would have been only £1,450, which at one-third off was less than half the valuation. These decisions illustrate the artificial nature of the presumption governing the doctrine of total loss.

The question has become of less practical importance in Pennsylvania, from the introduction of a clause into many of the policies of insurance in that State, providing, that the valuation in the policy, where the ship is there valued, and where she is not, the value at the home port, and not at the place where the accident happens, shall be taken as the standard of computation, for the purpose of determining whether the amount of injury sustained falls short of or equals one-half the worth of the vessel.

It is well settled in the English courts that the vessel cannot be abandoned, because the cost of repairing her at the port of necessity will be more than she is worth, if she can be sufficiently repaired there to be taken elsewhere, and finally put in navigable order, at a cost, which, in the whole, falls short of her value. *Reed v. Darby*, 10 East, 143; *Doyle v. Dallas*, 1 M. & R. 48. In *Doyle v. Dallas*, Lord Ten-

derden told the jury, that the underwriters did not undertake that the ship should be able to carry the cargo which she had, or was about to put on board, and that the loss was not total, if she could have been so far repaired, as to reach her destination with any cargo, or even in ballast. The undertaking of the insurers is, however, not merely that the vessel shall continue to exist in specie, but that she shall exist in a state fit for the service for which she is insured, and will, consequently, be broken, if the completion of the voyage is prevented by a peril enumerated in the policy. *The Delaware Ins. Co. v. Winter*, 2 Wright, 176, 187. It was accordingly held in *Abbott v. Broome*, 1 Caines, 292, that where the vessel was disabled from carrying her cargo to its destination the loss was technically total, although she might have gone on in ballast, or with a more buoyant cargo. And Radcliff, J., said, that the question was not whether the vessel might have been so far repaired as to prosecute the voyage with a half, or any other portion of her cargo, but whether she was capable of proceeding or being refitted to proceed with the whole. She had been insured to carry her cargo from Batavia to New York, and as she was incapacitated from doing this the plaintiffs might abandon and claim a total loss. The cost of full repairs at the port of necessity is accordingly the measure of the loss in the United States, even when the ship might be partially repaired there, and carried to some other port where the repairs could be completed at a much lower rate. *Suarez v. The Sun M. Ins. Co.*, 2 Sandford, 482; *The Insurance Co. v. Goodman*, 32 Alabama; *Abbott v. Broome*; *Center v. The American Ins. Co.*, 7 Cowen, 564, 580; 4 Wend. 45. But the inability to make full repairs at the port of necessity from a want of workmen or materials will not justify an abandonment, if the vessel can be partially repaired, and then carried elsewhere for full repairs, at a cost in the whole of less than half her value. *Center v. The American Ins. Co.*; *Hall v. The Franklin Ins. Co.*, 9 Pick. 466, 483; *Lincoln v. Hope Ins. Co.*, 8 Gray, 22.

We have seen that the right to treat injuries equalling half the value as constructively total will fail if the vessel is restored to her former condition before the abandonment is made (ante). Under these circumstances, all that can be recovered is the cost of the repairs, even when it exceeds the market value of the vessel. *Benson v. Chapman*, 6 M. & G. 722; 5 C. B. 330. The result will be the same, whether the repairs are made by the owner or by the master acting under the general authority derived from his position. But to make the rule applicable, the vessel must be restored to her former condition, and the insured may abandon notwithstanding partial repairs at the port of necessity, followed by the arrival of the ship at her destination, unless she can be fully repaired there at a cost of less than half her value.

*Suarez v. The Sun Ins. Co.*, 2 Sandford, 482. Whether injuries inflicted voluntarily on the property for the good of all concerned, and which, consequently, fall within the definition of a general average, should be computed in ascertaining the existence of a constructive total loss, has given rise to a number of decisions which do not all agree; but the weight of authority would seem to be that the question should be answered affirmatively; *Forbes v. The Manufacturers' Insurance Company*, 1 Gray, 571; *Pezant v. The National Insurance Company*, 15 Wend. 453; *Potter v. The Providence Insurance Company*, 4 Mason, 298; *Kemp v. Halliday*, 1 Q. B. L. R. 520; *Greeley v. The Tremont Ins. Co.*, 9 Cushing, 415; unless the right is expressly or impliedly negatived by the terms of the policy. *Sewall v. The United States Insurance Company*, 15 Pick. 90; *Reynolds v. The Ocean Insurance Company*, 22 Id. 191. If the masts are cut away to right the vessel, and the hull is subsequently burnt or submerged, the loss is actually total; and the principle is the same in the case of a constructive total loss. A promise to indemnify against a peril implies an obligation to be answerable for the consequences which it involves, and hence the maxim *causa proxima non remota spectatur* operates to charge the insurers, but is not a reason for freeing them from liability. In *Forbes v. The Manufacturers' Ins. Co.*, the court held that goods which had been thrown overboard to lighten the vessel should be taken into view in determining whether an abandonment of the cargo was valid; and it is generally conceded that the expense incurred in floating a submerged or stranded vessel cannot be properly excluded in the computation of a total loss, because there is a cargo on board that will be benefited by the sacrifice; *Sewall v. United States Ins. Co.*, 11 Pick. 90; *Kemp v. Halliday*, 1 Q. B. L. R. 520, although that portion of the cost which should be borne by the cargo is not charged in England to the account of the vessel. *Kemp v. Halliday*. It is now, however, established in Massachusetts that injuries which are strictly general average, must be left out of view in determining whether the loss equals or falls short of half the value. *Greeley v. The Tremont Ins. Co.*

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## MEMORANDUM. CONSTRUCTIVE, TOTAL LOSS.

## MOREAN v. THE UNITED STATES INSURANCE COMPANY.

In the Supreme Court of the United States.

FEBRUARY TERM, 1816.

[REPORTED, 1 WHEATON, 219-231.]

*The insurer on memorandum articles, is only liable for a total loss, which can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination.*

*Where the ship being cast on shore near the port of destination, the agent of the insured employed persons to unlade as much of the cargo (of corn) as could be saved, and nearly one-half was landed, dried, and sent on to the port of destination, and sold by the consignees at about one-quarter the price of sound corn; this was held not to be a total loss, and the insurer not to be liable.*

ERROR to the Circuit Court for the District of Pennsylvania. This was an action commenced by the plaintiff in error, upon a policy of insurance dated the 14th of December, 1812, on goods on board the brig Betsey, at and from Cape Henry to Lisbon, at a premium of six per cent., on which 5,000 dollars were underwritten by the defendants, and valued at that sum, declared to be against all risks, except British capture, warranted American property. The jury found a verdict for the plaintiff, subject to the opinion of the court, upon the following facts agreed by the parties. The cargo consisted of 4,406 bushel of Indian corn, 100 barrels of navy bread, and 20 barrels of corn meal. The brig sailed from Baltimore on the 11th of November, 1812, and from Cape Henry on the 13th of the same month. She experienced, on the voyage, many and severe gales of wind. On the 18th of December, she passed the rock of Lisbon, and came to anchor about four miles below Belem Castle. She leaked considerably, in consequence of

the injury she had sustained from the severe gales to which she had been exposed. After passing the rock the wind died away, and the current being adverse, she came to anchor. The master and supercargo landed, went through the customary forms at Belem to obtain a permit to pass the castle, and then proceeded to Lisbon. The health boat visited the brig, and ordered her to get above the castle as soon as possible. On the 19th, she was again exposed to a heavy and fatal gale, and drove ashore near to Belem Castle, the sea breaking over her, and the crew hanging by the rigging to preserve their lives. The supercargo considered both vessel and cargo totally lost. By directions of the custom house, as much of the cargo as could be got out, was unladen by a number of French prisoners who were employed for that purpose. The cargo was all wet, and the part of it which was then taken out was carried to the fort, where it was spread and dried. From thence it was carried to Lisbon in lighters, and was sold in the corn market by the consignee of the cargo. The quantity so saved and sold amounted to about 1,988 bushels, which was sold at fifty cents a bushel, whereas the price of sound corn was two dollars and twenty-five cents a bushel. The supercargo petitioned for liberty to sell the corn at the place where it was first deposited and dried, which could not be granted, and he was obliged to submit to the custom of the place, and allow it to be sold at the corn market. The brig was so completely wrecked, that she was sold, with her materials, where she lay, in lots. Had the supercargo been left to the free exercise of his own judgment, he would not have attempted to save any part of the cargo, in consequence of the total damage, and the great expense of saving it. The net proceeds of the cargo were not much more than the expenses of saving it, including those of the supercargo. The port of Lisbon commences above Belem Castle, and the custom of the place is to discharge cargoes of corn between that castle and Cantara, which latter place is from one to two miles below Lisbon. The vessel never arrived at her port of discharge. On the 22d of December, she was entered at the custom house by the American vice-consul, which he said was necessary; but port dues do not attach to vessels till they pass the castle. Still, as part of the cargo was carried to Lisbon, the entry was made by the consul, and the dues were paid. On the 11th of March, 1813, the plaintiff having received notice of the shipwreck offered to abandon, which was refused. Upon these

facts, the Circuit Court gave judgment for the defendants, and the cause was brought by writ of error into this court.

Mr. *Pinkney*, for the plaintiff. By the shipwreck and breaking up of the voyage, the plaintiff was entitled to abandon ; and there is no distinction in law in this respect between the memorandum articles and general articles. The wreck disabled the ship from transporting the commodity, and the assured was not obliged to find another vehicle to carry it on. Here more than a moiety of the thing insured was annihilated, to say nothing of the deterioration of the rest. By the contract, it became the duty of the agent of the insured, to labor about the thing ; and, if the wreck and consequent damage justified the right of abandonment, what effect can the conduct of the supercargo have ? The subsequent transportation can have no effect on the right of abandonment : the supercargo was compelled to carry it on by the Portuguese government for the supply of the capital. The law holds, that the insured shall not abandon in the case of memorandum articles upon *deterioration* merely. This is not a mere technical total loss ; it is the same thing as if the waves of the sea had washed this portion of the cargo up to Lisbon. The usage of the government, in compelling a sale in such cases, must have been equally known to both parties, and ought to operate equally on both.

Mr. *Harper*, contra. (1.) A distinction was here attempted to be taken, on account of the nature of the peril by which the loss was occasioned. But the law prescribes, that the insured must carry on memorandum articles, if possible, in another vehicle. No degree of injury, short of total destruction, will justify the insured in abandoning without making an effort to carry on the articles ; and their actual arrival at the port of destination, no matter how, prevents abandonment. (Marshall on Insurance, Condry's ed. 223, and the cases there cited.) Our policies contain no stipulation similar to those in the English, as to "stranding of a ship," in the case of memorandum articles. Wreck cannot help the insured where the consequence is the destruction of the *voyage* only, without the actual destruction of the *thing*. The right of abandonment exists, while the peril of total loss exists ; but when the article is saved from that peril, the right no longer exists. (1 Caine's R. 21, *Magrath & Hugging v. Church* ; 3 Caine's R., *Neil-*



son et al. v. The Columbian Insurance Co.; 9 Johns. R., Sheffelin v. The New York Insurance Co.; 2 Camp. N. P. Cases, 623, Wil-son v. The Royal Insurance Co.; 7 East, 88, Anderson et al. v. The Royal Insurance Co.) (2.) The right of abandonment was not exercised in due time; not until after the peril had ceased. Memorandum articles may be abandoned while they are submerged, or the hand of the enemy is upon them; but here the loss of the voyage was repaired by other means found to carry on the goods before the abandonment is made. (Ibid.) They were transported, not by violence, but according to the usage of the country; and the parties must be considered in law to have consented to this usage.

Mr. *Pinkney*, in reply. If the insured was not obliged to carry on the commodities, and he would have had a right to abandon at the time, nothing subsequent has divested it. The sole object of the memorandum clause is to exempt the insurer from liability for deterioration only, and the reason was the inherent tendency of these articles to decay. The destruction of the vehicle, and the destruction of the greater part of the things transported, justified the abandonment. None of the cases cited apply to this case; and the insurer knew of the usage as well as the insured. If this case be determined not to be a case justifying abandonment on account of the saving of so small a part, what case of abandonment of memorandum articles can exist? The abandonment was in time, because made in good faith, and as soon as the injured knew of the peril.

March 11th. Mr. Justice WASHINGTON delivered the opinion of the court, and, after stating the facts, proceeded as follows:

All considerations connected with the loss of the cargo in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

If the property arrive at the port of discharge, reduced in quantity or value to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss that he might not have declined an abandonment, and demand a partial loss.

But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer, for a partial loss, and, consequently, he cannot elect to turn it into a total loss. These principles are clearly established by the case of *Mason v. Skurray* (at N. P. 1780, Park, 116; Marshall, Condry's ed. 223); *Neilson v. The Columbian Insurance Company* (3 Caines's Rep. 108); *Cockin v. Frazer* (Park, 114; Marshall, 227, Condry's ed.); *McAndrews v. Vaughan* (at N. P. 1793, Ib.); *Dyson v. Rowcroft* (3 Bos. & Pul. 474), and *Magrath & Huggins v. Church* (1 Caines's Rep. 196). The only question that can possibly arise, in relation to memorandum articles is, whether the loss was total or not; and this can never happen where the cargo or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy. If the question turn upon the totality of the loss unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in reality, or is such as the insured is permitted to treat as such, he is entitled to abandon and recover as for a total loss in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss. Keeping this distinction in view, the loss of the voyage by capture, shipwreck, or otherwise, may be treated as a total loss. This is the doctrine in the case of *Dyson v. Rowcroft*, in which the right to abandon was placed not upon the ground of deterioration of the cargo, but upon the justifiable necessity which resulted from it of throwing the cargo overboard: this was, in effect, the same thing as if it had, in a storm, been swept from the deck. Such, too, was the case of *Manning v. Newnham* (Park, 169). In *Cocking v. Frazer*, no such necessity existed, and the breaking up of the voyage was attempted to be justified by the damaged state of the cargo, which, per se, did not justify the insured in putting an end to the voyage, and thus to turn a partial loss, for which the insurer was not liable, into a total loss. *Magrath & Huggins v. Church*, establishes the same doctrine. Now, what is the present case? The ship being thrown on shore, within a mile or two from her port of destination, the agent of the insured employs persons to unlade as much of the cargo as could be saved,

and nearly one half was, by his exertions, landed, dried, and sent to the market at Lisbon, and sold by the consignees at about one-quarter the price of sound corn, leaving a very inconsiderable sum for the owner, after paying the expenses. Is not this precisely the case of *Neilson v. The Columbian Insurance Company*, and *Anderson v. The Same* (Caines's Rep. 108), with this difference only, that in the first case the insured declined sending on the corn, when he might have done so, and, consequently, he was not permitted to turn a partial into a total loss by his own neglect; and in the latter case, part of the cargo having been rescued from the wreck, before the offer to abandon was made, the insured could not claim as for a total loss, either on account of the injury which the corn had sustained, or of his own act in not sending it forward to its port of destination.

In addition to the cases above referred to, the cases of *Biays v. The Chesapeake Insurance Company*, and *Marcardier v. The Same*, in this court, are strongly applicable to the present, and seem in a great measure to settle it. But it is contended by the counsel for the plaintiff, that if the loss be such as that the insured might at one time have treated as total, it continues to be so, unless at the time when the offer to abandon is made clear of the effects of the peril, and in a condition to prosecute the voyage, it is restored to his possession. Now, this is certainly not the condition of property, which, at the time of the offer to abandon, is in the possession of a recaptor, who has a right to retain it until he is paid his salvage. But, in the present case, the corn never was out of the possession of the agents of the insured, who exercised every act of ownership over it, subject, nevertheless, to the laws and customs of the country, to which it was sent, with which the insurer and the insured are supposed to have been acquainted at the time they entered into this contract, and to which they impliedly agreed to submit. The cargo which was landed, not only continued in the possession, and under the direction of the agents of the insured, but it was relieved from the effects of the peril, as between the insurer and the insured, and it was not only in a condition to prosecute the voyage, but it did in reality complete it. Upon the whole, it is the opinion of the court, that this is not such a loss as the defendants engaged to indemnify against, and that judgment should be given in their favor.

Judgment affirmed.

The interpretation of the common memorandum, under which such goods as the parties may think fit to designate, are warranted free from average, unless general, has been attended with more difficulty than could easily have been anticipated, when that clause was first introduced into policies of insurance. For although the only question that can arise under a provision, which expressly excludes average or partial losses, is, whether the loss in controversy is entire or partial, yet this necessarily depends on the import of the word total, which may mean either losses which are total in themselves, or those which are made so by legal construction (ante, 702).

The cases have finally established, on the one hand, that when losses, which are essentially partial, are excluded from the policy by the memorandum, they cannot be brought within it by any process of construction, because the exception shuts them out from the benefit of the insurance; and on the other, that the memorandum will not deprive the insured of the right to an indemnity for losses which are actually or virtually total, merely because the goods or vessel still exist in specie. But this result was not reached, without some fluctuation of opinion, and leaves room for doubt, because it simply determines, that the insurers are not liable for a constructive total loss,\* without determining what losses are actually or constructively total.

The question arose at an early period in this country, under the rule of American jurisprudence, that every loss, which exceeds half the value of the property insured, is constructively total, and will warrant an abandonment to the insurers. This gave birth to the argument, that no loss which was total under the rest of the policy, could be within a proviso relating solely to partial losses. *Kettell v. The Alliance Ins. Co.*, 10 Gray, 144, 152. But this position was too plainly at variance with the intention of the parties, to find favor with the courts, and was overruled in the principal case, on the ground, that a partial loss is not the less excluded by the memorandum, because it may also be constructively total. In other words, the loss must be total and not partial, for if it be in any sense partial, it is not within the contract. So, in *Magrath v. Church*, 1 Caines, 196, the injury inflicted on a cargo of grain, by cutting away the masts, and thus giving the water which broke over the vessel access to the hold, was held to fall within the terms of the memorandum, although it exceeded half the value and, but for the exclusion of average losses would have warranted an abandonment to the insurers. The same rule was followed in *Neilson v. The Columbia Insurance Company*, 3 Caines, 108; *Saltus v. The Ocean Insurance Company*, 14 Johnson, 138, and *Wadsworth v. The Pacific Insurance Company*, 4 Wend. 33; and is well established throughout the Union.

The principle is the same, whether the cargo consist wholly or in

part of memorandum articles, and will preclude a recovery for that portion of the goods which falls within the restriction, even when the injury to the residue of the cargo exceeds half its value, and is constructively total, so far as it is in question; *Marcadier v. The Chesapeake Insurance Company*, 8 Cranch, 39. It was, however, said by Story, J., that if the injury to so much of the cargo as lies without the memorandum, equals half the value of all the property at risk under the insurance, it will carry the memorandum articles along with it, and a recovery may be had for a total loss; or, as the rule was stated conversely in *Heebner v. The Eagle Ins. Co.*, 10 Gray, 131, 135, to constitute a constructive total loss under these circumstances, the damage to the residue of the cargo must be such that the insured might abandon if the memorandum articles were sound. If the question was an open one, it might be more reasonable to hold that an injury to one bale or package of merchandise will not justify the abandonment of another which is not damaged. Valin, liv. 3, tit. 6, art. 46.

In a recent case in Massachusetts it was, however, held that when metallic plates, brazier's rods, or other goods, not perishable in their own nature, which have been insured free from average, are damaged to the extent of more than half their value by a peril which breaks up the voyage, the insured may abandon and recover for a total loss. *Kettell v. The Alliance Ins. Co.*, 10 Gray, 144. The same principle was applied in *Heebner v. The Eagle Ins. Co.*, 10 Gray, 131, on the ground that the subject matter of the policy was not within the reason of a doctrine intended to protect the insurers against deterioration arising from inherent causes.

While it is well settled in general, that the injury to memorandum articles is to be estimated as if they stood alone, there is room for doubt, whether they are to be considered as a whole, or should be regarded as an aggregate of distinct items or parcels.

If the latter view be taken, an actual loss of part may be total so far as it is concerned, notwithstanding the preservation of the residue; if the former, the loss cannot be total so long as any portion exists, and is capable of being carried to its destination, in specie. The question arose in *Davy v. Milford*, 15 East, 559, where a vessel, laden with bales of flax, insured free from particular average, was wrecked off the coast of Sussex, and all her cargo lost, with the exception of some of the flax which was washed out of the bales and floated ashore by the waves in a loose and damaged condition. It was said, under these circumstances, by the counsel for the insurers, that as the insurance was entire on the whole body of the flax, and not specifically on the bales, the case stood on the same footing as if the cargo had been shipped in bulk, when it would have been clear that the loss was partial, and directly within the memorandum. But Lord

Ellenborough was of opinion, that the "preservation of some of the flax did not bring the rest, which was wholly destroyed, within an exception, which being designed to exclude partial losses, does not apply when there is an entire loss of any portion of the property covered by the insurance." This decision was qualified rather than overruled in *Hedburgh v. Pearson*, 7 Taunton, 154, where a recovery was refused for the entire loss of the greater part of the sugar contained in fifty hogsheads, insured free from average, because all the hogsheads came to land, and there was a small quantity of sugar in each.

The cases cannot, however, be reconciled on this basis without assuming first, that an insurance of goods in packages is a several insurance of each package, and next, that the flax which washed ashore, in *Davy v. Milford*, came from some of the bales only, while the rest was totally destroyed. The true ground of that decision seems to be that there was an entire loss of the voyage as it regarded the vessel, and that it would have cost more to dry and forward the flax than it was worth.

While the English courts proceeded on the idea that an entire loss of part might be total so far as it was concerned, although the rest continued to exist in specie, it was held in the United States, that unless the loss was actually total under the policy at large, it would be excluded by the memorandum. In *Biays v. The Chesapeake Insurance Company*, 7 Cran. h, 415, a lighter employed in landing hides insured free from average, was sunk between the vessel and the wharf. Some of the hides were altogether lost, and a heavy charge for salvage incurred in saving the others. It was said, under these circumstances, on behalf of the insured, that as the loss of the hides, which were not recovered, was not the less total, because the rest were finally rescued from the peril, it did not fall within the meaning of a clause relating only to partial losses. The court, were however of opinion, that the question whether a loss is partial or total, depends on the same principles whether partial losses are or are not excepted from the policy; and that, as the insured could only have recovered for a partial loss, in the absence of the memorandum, the insurers were entitled to take advantage of its presence.

"The loss," said Livingston, J., who delivered the opinion of the court, "has been considered as total, by the counsel of the assured, but the court cannot perceive any grounds for treating it in that way, inasmuch, as out of the many thousand hides which were on board, not quite eight thousand were lost, making in point of value somewhat less than one-sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once that he must have judgment only for a partial loss, which would have been

equivalent to the injury actually sustained. But, without having any recourse to reasoning on the subject, the proposition appears too self-evident, not to command universal assent, that, when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue, (which in this case, amounts to much the greatest part,) arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole." The force of this reasoning is obvious, and it is hardly answered by the argument, that as the object of the memorandum is to protect the insurer against losses arising from the perishable nature of the goods insured, it ought not to be applied where part of the property is wholly destroyed by extrinsic causes, which is open to the objection of qualifying the language of the parties by their supposed object, and making what they have said, yield to what they are presumed to have intended.

The case of *Biays v. The Chesapeake Insurance Company*, was prior to that of *Davy v. Milford*, and was not cited or considered in the latter decision, so that neither court had the aid of the judgment of the other. But, in *Waln v. Thompson*, 9 S. & R. 115, both were passed in review, and the preference given to the decision of the Supreme Court of the United States, not only in view of the greater weight due to it in an American tribunal, but because a different interpretation of the contract would afford room for the frivolous and vexatious demands which the memorandum was designed to exclude. The insurance was on the profits of a cargo of teas, at and from Canton to Philadelphia, and it was proved at the trial, that part of the tea had been thrown overboard during a gale, and another part sold at the Isle of France, in a damaged condition, while the residue was so much injured that the actual loss exceeded fifty per cent., and the whole adventure was a losing one to the insured. It was contended under these circumstances, that the injury to the goods was constructively total, under the rule in this country (ante), and therefore, without the terms of the memorandum, and that even if this were not so, still, the profits, which were the subject matter of the policy, were actually and wholly lost to the insured. But it was said, by Tilghman, C. J., who delivered the opinion of the court, that an insurance on profits is, in fact, an insurance of a specific and contingent interest in the goods out of which the profits are to arise; or in other words, an insurance of that portion of the value of the goods at their destination, which exceeds their cost and the expense of the voyage; and it was, consequently held, under the authority of the cases which have been cited, and on principle, that no recovery could be had for any portion of the loss.

The general principle, that the physical destruction of part of the

property at risk will fall within the memorandum, and impose no liability on the insurers, was also applied in *Humphreys v. The Union Insurance Company*, 3 Mason, 435, and a recovery refused for a number of boxes of oranges, which had been destroyed by the perils of the navigation, because the rest of the fruit insured arrived in specie, although in a decayed condition; and Story, J., who decided the cause, expressed his dissent from the doctrine of *Davy v. Milford*, and his concurrence with *Biays v. The Chesapeake Insurance Company*, in the following language:—

“The case of *Davy v. Milford*, 15 East, 559, is, however, a very strong authority for the plaintiff. There, the policy was on ‘flax,’ valued at £400, and warranted free from particular average. The ship was wrecked in the voyage. Part of the packages of flax were wholly lost, and part of them were saved, in a damaged state. The court held the plaintiff entitled to recover for the packages entirely lost, but not for those, of which there was a partial loss or damage: as to the damaged part, within the warranty; as to that which was totally lost, not.

“Upon this case, I confess myself to have great difficulties. No reasons are assigned by the court for the determination; and as at present advised, I think the rationale to be the other way. What is this but a determination, that the loss of the whole or any portion of the thing insured, capable of a distinct enumeration, and separated from the rest, is out of the warranty? Suppose the insurance had been on coffee, or corn, what difference is there between the loss of a single kernel, and a bag?—between the loss of part of an aggregate made up of artificial and separate parcels, and of an aggregate made of things, in their own nature single and separate? The loss of the whole of a bag of coffee or corn does not seem to me to differ in principle from the loss of an equal quantity of coffee or corn in bulk. The true meaning of the memorandum has hitherto been supposed to be, that it shall exempt the underwriter from all partial losses, or particular averages of the thing insured. What difference is there in principle or reason, between a partial loss or average by the damage of a part, and a partial loss by the destruction of an integral part of the thing insured? To ascertain what the loss is, it must be estimated with reference to the whole. The insurance is not on each separate parcel or part of the thing insured, as an integral subject, but on the whole, as an aggregate.

“The insurance in *Davy v. Milford* was not on each parcel of flax separately, but on the aggregate, as a totality. The memorandum warrants the underwriter free of particular average on the thing insured. It seems to me, that the error of the reasoning is in considering the insurance as a separate insurance on each distinct parcel, and



not as an insurance on the aggregate. This is a departure from the words of the policy. The court, in *Thomson v. The Royal Exchange Insurance Company*, 16 East, 214, and *Hedburgh v. Pearson*, 7 Taunton R. 214, 2 Marsh, 432, refused to apply the same rule, where sugars were insured, and a part of the contents of each of the hogsheads was lost by sea damage. In the former case, the policy was on 'goods' (tobacco and sugar) generally, in the latter, 'on hogsheads of sugar.' In each case the sugar was not merely damaged, but a part of the contents was wholly gone and destroyed. The distinction is certainly nice, between the loss of a whole hogshead, and the loss of the whole of a part of several hogsheads. If it had been the case of tobacco, or rice, or coffee, where the whole might have been saved, but in a damaged state, the ground of distinction would be more obvious. But when the very substance is gone, what difference can it make, whether it is the whole of one parcel, or a part of many parcels? If, therefore, I were called upon to decide this question de novo, my judgment would reluctantly acquiesce in, if it did not lead me to dissent from, the opinion in *Davy v. Milford*. But the question has been definitively settled against the distinction in *Davy v. Milford*, by the Supreme Court of the United States, in *Biays v. The Chesapeake Insurance Company*, 7 Cranch, 415, and *Morean v. United States Insurance Company*, 1 Wheat. R. 219. These decisions are imperative upon me, and coincide with what I cannot but consider as the true and rational exposition of the memorandum."

Had *Davy v. Milford* been decided on the ground that the property lost, was in distinct parcels from that which was saved, it would unquestionably have been open to the criticism which was made on it in the course of this opinion, that there is no difference between the loss of part of a commodity shipped in cases or packages, and of the same commodity laden in bulk, unless the packages are insured specifically and severally, so that each is virtually the subject of a distinct insurance. But the distinction taken by Lord Ellenborough, would seem to have turned on the difference between a mere deterioration in quality or value, which is necessarily an average loss, and the entire destruction of part of the property insured, whether separated from the rest by the mode in which it is packed for transportation, or thrown with it into one heap or aggregate. In this sense it may be said that each fibre or particle is distinct from every other, and there is a total loss if it be destroyed. The flax was undoubtedly packed in distinct bales or parcels, but all that was preserved came on shore loose, and free from the wrappings in which it had been enveloped. The presumption, therefore, is, not that any package was wholly lost, but that some portion of each escaped destruction, and it is expressly stated that no entire package was saved. The case, therefore, stood

on the same footing as if there had been but one parcel, or a stowage in bulk, and the decision was put distinctly, on the ground, that the flax which perished was not the less wholly lost, because the rest escaped in a damaged condition.

The turning point of the decision in *Davy v. Milford*, was more justly appreciated in *Wadsworth v. The Pacific Insurance Company*, 4 Wend. 33, where it was said to depend, not upon a difference between a lading in separate packages and in bulk, but upon the more intelligible distinction between the entire destruction of a part, and a partial injury to the whole of the subject matter of the insurance.

But while due weight was given to the argument of Lord Ellenborough, the court followed the uniform course of decision in the United States, by rendering a judgment for the defendants, which was subsequently affirmed by the Court of Errors. It was said in like manner in *Newlin v. The Ins. Co.*, 8 Harris, 312; that the insurers are not answerable under the memorandum for the loss or destruction of part of the goods, if the rest still exist in specie, and that this is equally true whether the exception is so worded as to include all average losses or those only which fall short of a certain ratio or proportion.

A similar view was taken in *Ogden v. The General Mutual Insurance Company*, 2 Duer, 204; of a policy on freight "free from average," which was held to be an entire contract, with an integral subject matter; and it was said that the insurance could not be apportioned among goods shipped on board the vessel at different rates, and by different persons, for the purpose of taking the loss on that part of the cargo on which no freight had been earned, out of the exception.

For a like reason an entire loss of part of the freight insured, by the entire loss of part of the goods, is a partial loss of freight within the memorandum, if the rest of the cargo can be taken in specie to its destination, although so much deteriorated as to be valueless; see *Lord v. The Neptune Ins. Co.*, 10 Gray, 109, 129; and such seems to be the well established rule throughout the Union. *Wallerstein v. The Columbian Ins. Co.*, 3 Robertson, 528. Where, however, some of the mules covered by the policy were destroyed during the voyage, while others were brought in safety to the port of destination, the loss was held to be total as to those which perished and as such not excluded by the memorandum. *Brook v. The Louisiana Ins. Co.*, 4 Martin, N. S. 648.

An insurance of goods "free from average," and an insurance "partial loss excepted," might seem to be different ways of expressing the same idea. In *Kettell v. The Alliance Ins. Co.*, 10 Gray, 144, however, the court held that a constructive loss of 50 per cent. of the value of the tin plates covered by the policy, might be made total by abandonment,

notwithstanding a clause excepting partial losses; while in *Heebner v. The Eagle Ins. Co.*, 10 Gray, 131, the insurers were made liable for a constructive total loss of a vessel insured "against total loss only," contrary to the opinion which seems to have prevailed in *Maurv v. Hatch*, 6 Massachusetts, 465; and *Buchanan v. The Ocean Ins. Co.*, 6 Cowen, 331; where, however, the question did not necessarily arise because there was no abandonment.

In *Kettell v. The Alliance Ins. Co.*, the court said that there was a marked distinction between goods which like iron wire, brazier's rods, and tin plates, were not perishable in their own nature, and goods which would perish of themselves without sea damage; and would seem to have thought if articles of the latter description were insured free from average, the insurers might be answerable for a constructive total loss. It is, however, questionable whether the interpretation of such a clause can be controlled by the nature of the subject matter to which it is applied.

The ratio which the property saved bears to that which is destroyed or lost, can have little influence on a rule which proceeds on the assumption, that there can be no recovery, unless the loss is total. But in *Bryan v. The Insurance Company*, 25 Wend. 617, the plaintiffs were held entitled to an indemnity for the loss of 1970 barrels of flour, which they had insured, free from average, although 27 barrels were rescued from the wreck of the vessel, while the rest were destroyed; and in *Depeyster v. The Sun Mutual Insurance Company*, 17 Barb. 306; this decision was said to rest on the ground, that the portion of the cargo which was preserved, fell within the maxim *de minimis*, and was too small in quantity and value to vary the result. But the true explanation of the case of *Bryan v. The Insurance Company*, would seem to be, that the loss which resulted from the submersion of the vessel, was really total from the first, and was not varied by the success of the purchaser in raising a few barrels in a damaged condition, at a cost which would seem to have exceeded their value. *Navonne v. Haddon*, 9 C. B. 30; *Rosetto v. Gurney*, 11 Id. 176.

In the recent case of *Hills v. The London Assurance Company*, 5 M. & W. 569, the English courts virtually abandoned, *Davy v. Milford*, for the sounder rule which prevails in this country. Wheat, valued at £1,600, and insured for £1,500, was shipped in bulk, from Konigsberg to London. The vessel sprung a leak while at sea in a severe gale, and a large part of the wheat was pumped up and washed overboard, in the course of the efforts made to free her from water. The case was said to be one of the entire loss of part of the subject matter of the insurance, and to be not the less total, within the authority of *Davy v. Milford*, because the residue escaped without injury. But the court held that, unless the contract could be interpreted as an insur-

ance of each kernel or particle of corn, which was out of the question, the loss was partial and within the terms of the memorandum. It was erroneously stated that the insurance in *Davy v. Milford*, was on sugar, and that each hogshead had been valued and insured separately, an assumption which would not have sufficed to reconcile the cases, if it had been true, because no one of the packages was saved, and the presumption would seem to have been, that a part of each was lost (ante, 737). But the weight due to *Hill v. The London Assurance Company*, is not lessened by this oversight; and it was cited and followed in *Rosetto v. Gurney*, 11 C. B. 176, 185, as conclusive against the right to treat the loss of part of a cargo—insured generally and collectively—as total within the words or meaning of a proviso, excluding average losses from the operation of the policy.

But while the rule which forbids an entire insurance to be apportioned for the purpose of taking a loss within the terms of the memorandum, out of its operation, is well settled, so far at least as the United States are in question, there is no reason why a number of articles should not be severally insured, and where this course is pursued the destruction of any one of the subjects of the policy may be absolutely total, notwithstanding the preservation of the rest. The difficulty is in the application of the principle, and to know when the several enumeration or valuation of the goods will so far control the contract as to render it apportionable. It has been said that, when goods of different kinds, covered by the same policy, are severally enumerated as exempt from average below a certain percentage or altogether, the ratio of the loss will be calculated on the value of each kind and not of the whole. *The Insurance Company v. Bland*, 9 Dana, 143; 2 Phillips, 505; 2 Arnould, 867. The same result will follow, when different species of merchandise are severally valued in the policy, although not enumerated severally in the memorandum. *The Ocean Insurance Company v. Carrington*, 3 Conn. 357; 2 Phillips, 507; *Silloway v. The Neptune Ins. Co.*, 12 Gray, 73. If for instance the insurance is on hides and sugar, the entire loss of the sugar will give a right to indemnity, although the hides are in specie. So when goods of the same kind are separately invoiced and insured, or when insurance is made specifically upon bales or other packages valued and invoiced by the bale or package, or number of packages or parcels less than the whole, the loss of an entire parcel or package thus separately valued and insured is a total loss within the memorandum. *Kettel v. The Alliance Ins. Co.*, 10 Gray, 144, 154. And it would seem to be established in England, that an insurance of different kinds of goods is so far apportionable, that the entire loss of one kind will be total, notwithstanding the preservation of the rest, and although the policy does not specify the goods on board; *Duff v. Mac-*

*kenzie*, 3 C. B., N. S. 16; *Wilkinson v. Hyde*, Ib. 30 : and in the latter case the court said, that when the goods are of different species, it is the same as if each species were enumerated. In this instance the goods were in separate packages, although some of the packages contained more than one kind, but this remark does not apply to *Duff v. Mackenzie*, when an insurance on "master's effects," was held to be as several as if each instrument or article of clothing had been specifically mentioned.

But the mere fact that the goods are in separate bales or packages, will not in the absence of a separate valuation render the insurance several, or take the loss of one or more of the packages out of the memorandum. *Rallie v. Janson*, 6 E. & B. 422; *Entwisle v. Ellis*, 2 H. & N. 549. In *Entwisle v. Ellis*, Watson, Baron, said, that it was clear that the destruction of part of such a cargo was not a total loss of part, but a partial loss of the whole; otherwise a recovery might be had under an insurance of a cargo of fruit free from average if a single apple or orange was destroyed. And the better opinion would seem to be, that the separate valuation of different hogsheads or bales of the same merchandise, will not justify an adjustment of the loss on the value of each hogshead or bale, without a clause authorizing such a computation. 1 Arnould, 320; 2 Id. 865-869.

The question arose, in *Newlin v. The Insurance Company of North America*, 8 Harris, 312, where "an insurance of \$5,200, on 104 bales of cotton, valued at fifty dollars per bale, free from average under five per centum, unless general," was held to be an entire contract, which embraced the goods at risk as a whole, and could not be apportioned for the purpose of giving the insured an indemnity for an injury sustained by some of the bales which exceed five per centum, if calculated solely with reference to them, but fell short of that ratio if the whole value of the property covered by the insurance was taken into view in making the computation. The case was examined at length by the court, who held, that if a separate valuation would constitute a distinct or severable insurance in any case, it would not do so when the whole was valued in the aggregate, and a separate and equal value affixed to each parcel, obviously for the purpose of showing that each was estimated as having the same value as the other. "Magens," said Black, C. J., who delivered the decision of the court, "gives it as his own opinion, that the percentage ought to be calculated on each package or parcel, especially where the amount insured on each parcel is expressly declared. But he admits that there is no rule on the subject, and that the general opinion of other merchants is not in accordance with his own. Arnould (vol. 2, p. 865) declares that the effect of a separate valuation of the parcels is to give a separate insurance on each. He seems to have taken it from a dictum of Lord Abinger,

in *Hills v. London Assurance Company*, 5 Mees. & Wel. 575, which was made under a total and palpable mistake, about the law and the facts of *Davy v. Milford*, and which amounts, at best, to no more than this : that a *separate insurance* on each hogshead of sugar would make the underwriter liable (though it be warranted free of simple average,) for the loss of any single entire hogshead. Phillips, in his work on Insurance (vol. 2, p. 507), says, that a separate valuation of *different articles* gives each article as a distinct basis on which to calculate the rate of exception, and cites *The Ocean Insurance Company v. Carrington*, 3 Connecticut, R. 357. Perhaps he means that, if several distinct kinds of property be insured, each at a distinct value, the rate of exception should be calculated on the value of the class or kind to which it belongs, and not on that of the whole invoice ; as if horses and oxen be valued separately, and a loss of the oxen occurs, the five per cent. must be calculated on the value of the oxen alone, and not on that of the horses and oxen together. I say, this is probably his meaning, because his words will bear that interpretation, and because the case he refers to decided nothing more. It cannot be denied, however, that his note in Benecke (Stevens & Benecke, 441), is free from ambiguity ; but he founds that too on the *Ocean v. Carrington*, the extent of which, as an authority, we think, has been misapprehended.

“ Among the writers, and in the codes, of continental Europe, we find no trace of the doctrine supported, or at least recommended, by Magens. Their definitions of average seem to exclude it. 2 Valin, 159 ; 2 Emerigon, 7. The only basis expressly given by them for computing the rate of exception is the amount insured by one policy ; 3 Pardessus, 424 ; and, even where there are several parties insured by the same policy, the per cent. is counted on the aggregate of their several interests. The insured, in such a case, are said to be a kind of partnership, and with regard to the insurer, represent all together but one person. 2 Boulay Paty, 423.

“ But admitting that a separate valuation of the separate packages or parcels of the same species of goods, is the same as an insurance, in terms distinct and separate, on each parcel, can we consider this a case of separate valuation ? None of the writers who assert this doctrine, has told us exactly what he means by separate valuation. If these bales had been each valued distinctly by itself, and especially if the value put on some of them had been different from the others, and if no aggregate sum had been given as the amount insured upon the whole, this case might have worn another aspect altogether. But the sum of \$5,200 is insured on the whole lot, and, though the price per bale is mentioned, it is only done as showing the process by which the sum total was calculated.”

It being thus established, that every loss which is partial, either in

its own nature, or within the meaning of the policy, as applied to the subject matter insured, will fall within and be excluded by the memorandum, it might naturally follow, that no loss which would be total, if the memorandum were absent, could be rendered partial by its presence, and thus brought within its operation. Yet this conclusion is hardly sustained by the authorities, where the voyage is completed, and the goods brought to the port of destination. For while the loss is confessedly partial, under these circumstances, so long as the property at risk is in being, and has an appreciable value, although so much injured, as to be worth less than the freight due for its carriage; *Glennie v. The London Assurance Company*, 2 M. & S. 371; *Thompson v. The Royal Exchange Insurance Company*, 16 East, 214; some of the decisions go still farther, and to the point, that a mere loss of value however total, will not constitute a total loss within the memorandum, if the goods still retain their original form and are susceptible of being carried to their destination. Thus, where a cargo of fish, insured free from average, "at and from Newfoundland to a port of discharge in Portugal," was so much injured by heavy weather during the voyage, that part of the fish was thrown overboard while at sea, and the residue, which was worthless, after the arrival of the vessel at Lisbon, the insurers were held free from liability, on the ground that an actual total loss means a total loss of the goods themselves, and not merely of the qualities which render them valuable. *Cocking v. Frasier*, 4 Douglas, 295. This decision was well calculated to give effect to the purpose of the memorandum, which is to protect the insurer from losses arising from the perishable nature of the goods insured, and not solely or principally from the agency or operation of external causes; but it was, notwithstanding, questioned by Lord Ellenborough, in *Cologan v. The London Assurance Company*, 5 M. & S. 449, where he expressed the opinion that the loss of a commodity is not the less total, because it exists in specie, if its whole value be gone, and it exists only in the shape of a nuisance. *Silloway v. The Neptune Ins. Co.*, 12 Gray, 73. In *Williams v. Cole*, 16 Maine, 217, the court adopted this view of the question, by holding that an entire loss of value is in fact a total loss, and will entitle the insured to an indemnity, notwithstanding an exception of partial losses from the benefit and operation of the policy. But the weight of authority in this country is the other way, and would seem to show, that nothing which falls short of the entire destruction or annihilation of the property at risk, can be a loss within the terms of the memorandum, where the question arises at the port of destination, and is not complicated by the intervention of circumstances which defeat the voyage, or preclude the possibility of carrying the cargo to its destination. *Wallerstein v. The Columbian Ins. Co.*, 3 Robertson, 528. The law was so held in *Neilson v. The Columbia Ins. Co.*, 3 Caines,

108, which was followed in *Depeyster v. The Sun Insurance Company*, 17 Barb. 301, and authoritatively confirmed in *Hugg v. The Augusta Insurance Company*, 7 Howard, 595, where it was said that an intrinsic loss of value is not a total loss within the memorandum, if the goods are in being, and can be forwarded with safety to themselves and those in charge of the vessel. And in *Williams v. The Kennebeck Insurance Company*, 31 Maine, 455, the court virtually overruled their prior decisions, and held, under the rule laid down in *Hugg v. The Augusta Insurance Company*, that the arrival of the goods in specie at their destination was conclusive against the right to recover under the memorandum.

It may, however, be observed, that no loss can well be partial within the memorandum, which would be actually total under the rest of the policy, without, or even with, the aid of an abandonment to the insurers; and the better opinion would seem to be, that an entire loss of value is virtually, if not actually total, and dispenses with the necessity for an abandonment, by rendering it useless, and leaving nothing for the insured to cede. It is true, that losses which are essentially partial, and therefore within the memorandum, cannot be taken out of it, on the ground that they equal half the value of the property at risk, and may therefore be treated as constructively total; because this rule is found on a legal fiction, intended to aid in the adjustment of existing liabilities, and which would be perverted from its true purpose, if it were permitted to impose them. But the breach of the contract of insurance, viewed as a contract of indemnity, is not the less entire, where the value of the property is wholly gone, or the insured deprived of its use and enjoyment, because it still exists in specie (*ante*, 699); and hence an entire loss of value might seem to fall without the memorandum and within the operation of the rest of the policy. Whether an abandonment is or is not necessary, should not vary the result, or be viewed as a material point in the determination of the question; for an abandonment can never create a total loss, although it may be a condition precedent to the remedy (*ante*).

It is well settled under the authorities in England and the United States, that where, in consequence of a marine disaster, the goods cannot be forwarded to their destination without an additional cost which equals or exceeds their value; a recovery may be had for a total loss, notwithstanding the memorandum; *Rosetto v. Gurney*, 11 C. B. 177; *Farnsworth v. Hyde*, 18 C. B., N. S. 835, 2 C. P. L. R.; and the principle is nearly if not quite the same when there is an entire loss of value. In the latter case the goods are not worth having; in the former, the insured cannot have them without paying as much as, or more than they are worth.

We have seen that an injury rendering the vessel unfit for naviga-



tion is virtually total with, and perhaps without the aid of an abandonment (ante, 688); *Ballard v. The Roger Williams Ins. Co.*, 1 Curtis, 149; *Cambridge v. Anderton*, 2 B. & C. 691; *Knight v. Faith*, 15 Q. B. 649; and it would seem that the insurers should be answerable under these circumstances, whether the insurance is or is not free from average. In *Murray v. Hatch*, 6 Mass. 465, a vessel insured against total loss only, was thrown by a storm on one of the West India islands, and too much injured to be sent to sea again without extensive repairs, which the master was unable to make for want of funds; but the court were of opinion, that as the vessel was in safety at a port where she might have been repaired, or the owners and insurers consulted, and their directions followed, the master was not justified in proceeding to a sale, and no recovery could be had under the terms of the policy; and a similar view was taken in *Buchanan v. The Ins. Co.*, 6 Cowen, 331. When, however, the point arose in *Heebner v. The Eagle Ins. Co.*, 10 Gray, 131, it was held that an insurance against total loss only, comprehends all losses that can under the rule prevailing in the United States be made constructively total by an abandonment. And Shaw, C. J., seems to have been of opinion that a similar construction should be put on an insurance free from average, when the subject is the vessel or goods not perishable in their nature. *Heebner v. The Eagle Ins. Co.*, 10 Gray, 131, 135; *Kettel v. The Alliance Ins. Co.*, Ib. 144, 152.

In the instances hitherto considered, the voyage might have been completed, and the question was whether the injury to the goods constituted a total loss. A different case arises when the voyage is interrupted by a cause for which the insurers are responsible, because the cargo is insured for the voyage, and if it cannot be delivered in consequence of the perils of the sea, the contract is as much broken as if the subject matter was destroyed. *Lord v. The Neptune Ins. Co.*, 10 Gray, 199, 117. There are, consequently, two kinds of total losses; one where the peril operates to destroy the goods; the other, where it prevents the completion of the voyage, and as neither of them is withdrawn from the operation of the policy by the memorandum; so a recovery may be had under it for both. *The Delaware Ins. Co. v. Winter*, 38 Pennsylvania, 176; *Tudor v. The New England Ins. Co.*, 12 Cushing, 554. In *Manning v. Newnham*, 3 Douglas, 130, the insurers were accordingly held answerable for a total loss on ship, freight and cargo insured free from average, although the ship and cargo were in safety at the port of departure; because the ship which had been compelled to put back by a storm was disabled from continuing the voyage, and there were no available means for the transportation of the cargo. The principle is the same, whether the peril acts indirectly through the ship, or directly on the goods; and in *Dyson v. Rowcroft*, 3 Bos. and Pul. 476, the loss was held to be total within the memorandum, on proof

that part of the cargo had been thrown overboard during a gale to save the ship, and that the rest were too much damaged to be kept or carried forward. Whether the goods were destroyed by the perils of the sea or reduced to such a condition that they could not be preserved, was said by Lord Alvanley not to vary the nature of the loss or the liability of the insurers. The same result was reached in *Perry v. Aberdeen*, 9 B. & C. 411, where the ship was stranded, and the cargo too much injured by salt water to bear transportation from the coast of Italy, where the disaster happened, to the place of destination in England.

It is equally well settled that where the cargo is damaged and would perish by decay if forwarded, the insured will not lose the right to compensation by effecting a sale for the benefit of all concerned. In *Roux v. Salvador*, 1 Bing. N. C. 526, 3 Id. 226, raw hides insured free from average, at and from Valparaiso to England, were so much injured during the voyage that the master was compelled to sell them at Rio de Janeiro where the vessel had taken refuge. The ship was repaired, and completed the voyage in safety with the rest of the cargo, while the purchaser preserved the hides by tanning, and might have forwarded them by the ship. The question whether the insurers were liable for a total loss was decided affirmatively by the Court of Common Pleas, and subsequently on error by the Exchequer Chamber, who held, on the authority of *Dyson v. Rowcroft*, that when the goods cannot be carried to their destination in specie, in consequence of damage inflicted by a peril of the sea, the contract of insurance is as much violated as if they were destroyed. In delivering the judgment of the court below, Tindal, C. J., said, that it was a necessary inference from the evidence "that in consequence of damage from perils of the sea, one of the perils insured against, it became impracticable to carry the hides, in specie, to the termination of the voyage for which they were insured; and that, if it had been possible to have taken them to Bordeaux, they would have arrived in a state of putridity, having altogether lost the character of hides. We do not hold the loss to be total, upon the ground that the hides, if carried to Bordeaux, would have arrived in so bad a state, that they would have sold for less than the freight and expenses, or would have been altogether unsalable there; that state of circumstances might not be sufficient to make a constructive total loss, where the underwriter has guarded himself from being answerable for average losses by a special clause in the policy;—but we hold it to be total, on the ground, and that ground only, that, upon the evidence, they never could have arrived as hides at all. The present case appears to agree so nearly with that of *Dyson v. Rowcroft*, 3 Bos. & Pul. 474, that no sound distinction in this respect can be made between them. And the judgment given by Lord Alvanley, appears to us to govern the case now under discussion. 'Unless,' says Lord Alvanley, 'the consequence

of the damage sustained, be the total loss of the commodity, the underwriter does not agree to be answerable ; but if the commodity be totally lost to the assured, he undertakes to pay.' And afterwards, discussing what is a total loss, he says, 'the commodity here was in such a state that it could not be suffered to remain on board, consistently with the health of the crew ; in consequence of this necessity the commodity was annihilated, by being thrown overboard.' We think the facts of the present case, bring the hides into the same predicament as the fruit there ; either they would have been annihilated by putrefaction, or by being thrown overboard. And upon that supposition, a sale by the captain, which was necessary and expedient for all concerned, made the loss not the less total."

A similar view was taken by Lord Abinger, when the case came before the Exchequer Chamber. "It has been contended," said he, "that even if these goods had not been excepted from average loss by the memorandum, unless upon the condition of stranding, there would not in this case have been a total loss ; and that a fortiori, being goods so expressly excepted from average loss by the memorandum, they could not become totally lost, so long as any part remained in specie at the termination of the risk, and that the risk terminated when the goods were taken out at Rio de Janeiro, when they were so far from being destroyed by the perils of the sea, that they were actually sold as hides, and were capable of being tanned.

"It appears to us, that there is no ground whatever for this assumed distinction between goods that are subject to a partial loss unconditionally, and goods excepted by the memorandum from such a loss. The interest which the goods assured may have, in certain cases, to convert a partial loss, into a total loss, may be a fair argument to a jury upon a doubtful question of facts, as to the nature of the loss, or the motive for an abandonment, and in the same view that interest has been adverted to occasionally by judges where the conclusions to be drawn from facts, upon a special case, or upon a motion for a new trial, were open to discussion. But there is neither authority nor principle for the distinction in point of law ; whether a loss be total or partial in its nature, must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be partial or total ; it does no more than preclude an indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss, or to the principle on which a total loss is to be ascertained.

"Dismissing this distinction, then, the argument rests upon the position, that if, at the termination of the risk, the goods remain in specie, however damaged, there is not a total loss. Now this position may be just, if by the determination of the risk is meant the arrival of

the goods at their place of destination, according to the terms of the policy.

"But there is a fallacy in applying those words to the termination of the adventure, before that period, by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain, by the goods being prevented, by the perils of the sea, from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel; whether upon such an event the loss is total or partial, no doubt depends upon the circumstances. But the existence of the goods, or any part of them, in specie, is neither conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured becomes possessed, or can have the control of them, if they have still an opportunity of sending them to their destination—the mere retardation of their arrival at their original port, may be of no prejudice to them, beyond the expense of reshipment in another vessel. In such a case the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same, or any other vessel; if it be certain that before the termination of the original voyage, the species itself would disappear and the goods assume a new form, losing all their original character; if, though imperishable they are in the hands of strangers, not under the control of the assured; if by no circumstance over which he has any control they can ever, or within no assignable period, be brought to their original destination,—in any of these cases, the circumstances of their existing in specie, at that forced termination of the risk, is of no importance. The loss in its nature is total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or from any other insuperable obstacle."

In this case the goods were too much injured to be forwarded in specie, but the principle is the same when the completion of the voyage is prevented by any other cause for which the insurers are responsible. An injury to the ship which is irreparable, or which cannot be repaired without a disproportionate expense, will, accordingly, be a total loss of the cargo if no other means of transportation are available. *Manning v. Newnham*, 3 Douglas, 130; *Robinson v. The Commonwealth Ins. Co.*,

3 Sumner, 220; *Lord v. The Neptune Ins. Co.*, 10 Gray, 109, 113, 117. And so the loss may be total when the ship is capable of carrying the cargo and the cargo might be forwarded in the ship, if the goods are wet or damaged, and the cost of landing, drying and reshipping them would exceed their value. *Rosetto v. Gurney*, 11 C. & B. 177. The insurers engage not only that the goods shall not be destroyed, but that they may be carried to their destination notwithstanding the perils of the sea, and in determining whether this can be accomplished it is necessary to consider not merely what is possible, but how much it will cost. To require that a loss should be averted by incurring a greater loss would be contrary to the reason which is the life of the law.

"In matters of business," said Maule J., in *Moss v. Smith*, 9 C. B. 94; a thing is commonly treated as impossible, which is impracticable, and as impracticable, when it cannot be done without laying out more money than the thing is worth."

An injury to the ship which cannot be repaired, without an expenditure which exceeds her value, is accordingly deemed irreparable in England; *Moss v. Smith*; and will constitute a total loss of the cargo, if it cannot be sent forward by other means; see *Navonne v. Haddon*, 9 C. B. 30; and the same result will follow in the United States; when the injury equals half the value of the vessel (ante, 705), *Robinson v. The Commonwealth Ins. Co.*, 3 Sumner, 220; *Coolidge v. The Gloucester Ins. Co.*, 15 Mass. 341; *McGaw v. The Ocean Ins. Co.*, 23 Pick. 405, 410. For as the ship owner is legally entitled to abandon under these circumstances, as between himself and the insurers of the vessel, he is not bound to prosecute the voyage for the benefit of the insurers of the freight or cargo. See *Thwing v. The Washington Ins. Co.*, 10 Gray, 443, 455. So the question whether the cargo of a disabled vessel may be sold at the port of necessity, and a recovery had for a total loss, will be answered affirmatively, if the cost of recovering and forwarding the goods, would, after deducting the amount that would have been due under the original contract of affreightment, be more than they are worth. *Rosetto v. Gurney*, 11 C. B. 177; *Farnsworth v. Hyde*, 11 C. B., N. S. 835; 2 C. P. L. R.; *Reimer v. Reingrose*, 6 Exchequer, 263. "The question for the jury," said Jervis, C. J., in *Rosetto v. Gurney*, "will be, was it practicable to send the whole or any part of the cargo to its place of destination, Liverpool, in a marketable state? To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transhipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight. Add to these items, the salvage allowed, in proportion to the value of the cargo saved—and the loss

will be total, if the aggregate exceed the value of the cargo when delivered at Liverpool, the port of discharge. But, if the aggregate do not so exceed the value of the cargo, or of that part of it saved, the loss will be partial only." The same rule was applied in *Farnsworth v. Hyde*.

An abandonment made on such grounds will not be defeated by the act of the insurers, in saving part of the cargo and forwarding it in another vessel, because the right to abandon depends on the state of the facts at the time and not on what occurs subsequently, (ante, 683); see *Ellicott v. The Alliance Ins. Co.*, 14 Gray, 318; and a loss is not less total, because it may be averted by expending more than the property at risk is worth, (ante, 703). *Perry v. The Ohio Ins. Co.*, 5 Ohio, 365; *Bridges v. Niagara Ins. Co.*, 1 Hill, 423; *Hill v. The Rising Sun Ins. Co.*, Disney, 308. In *Wallerstein v. The Columbian Ins. Co.*, 3 Robertson, 528; the point was, however, decided the other way, and the arrival of any portion of the goods said to be an answer to a claim for a total loss under the memorandum, which could not be overcome by showing that the cost of transportation exceeded their value when there, and that they were forwarded by the insurers for the express purpose of defeating the abandonment which had been made by the insured.

It is equally well settled in the United States, that when the completion of the voyage is prevented by a cause for which the insurers are responsible, the insurers will be answerable, notwithstanding the memorandum. *Hugg v. The Augusta Ins. Co.*, 7 Howard, 595; *The Delaware Ins. Co. v. Trustee*, 2 Wright, 176; *Tudor v. The New England Ins. Co.*, 12 Cushing, 554; *Poole v. The Protection Ins. Co.*, 14 Conn. 47; *Robinson v. The Commonwealth Ins. Co.*, 3 Sumner, 220; *Treadwell v. The Union Ins. Co.*, 7 Cowen, 220; *Depeyster v. The Sun M. Ins. Co.*, 19 New York, 272. A different view seems to have been taken in *Depeyster v. The Ins. Co.*, 17 Barb. 306; but the case is a questionable one, and when the point was brought before the Court of Errors, it was decided in conformity with the English doctrine. In *Poole v. The Protection Ins. Co.*, where hides insured free from average, which had been saved from the wreck of the vessel, were brought to one of the Bahama Islands in a state of incipient putrefaction, and sold for the benefit of all concerned, it was held to be a total loss, because the hides could not be forwarded, and the only alternative was a sale. This case nearly resembles *Roux v. Salvador*, and was decided upon the same principle. In like manner, where a ship laden with ice, was disabled during a gale, and compelled to await repairs at an intermediate point in the East Indies, it was held that the cargo might be sold and a recovery had for a total loss, because the ice was melting rapidly, and an attempt to keep and forward it would be disastrous to all the

parties interested. *Tudor v. The New England Ins. Co.*, 12 Cushing, 504.

The principle of these decisions is a wise and beneficial one. When the voyage is interrupted by a marine disaster, it may be necessary to choose between selling perishable commodities, and keeping them until the ship can be repaired, with a certainty that they will decay. If the former alternative could not be adopted without losing the right to an indemnity, the insured would naturally adopt the latter, and an injury would ensue, for which there would be no equivalent. It is therefore for the interest of all concerned that he should be authorized to dispose of the goods at once, and recover for the total loss which the sale has averted.

The rule and the reason of it were stated with great clearness by the Supreme Court of Massachusetts, in delivering judgment in the case of *Tudor v. The New England Ins. Co.*

"The contract with the underwriters on a cargo for a voyage is, that the goods shall arrive at the port of destination uninjured by the perils of the sea, and in the case of memorandum articles that they shall then exist in specie though partially injured or destroyed. If, therefore, by reason of the perils insured against, it is rendered certain in the course of the voyage, that the article insured will inevitably perish or waste away, or that on arrival it will cease to exist, it is a total loss under the memorandum clause; and a sale of the article, at an intermediate port in which the vessel is, by reason of distress, will be justified, and the proceeds will become a salvage for the benefit of the party who is to bear the loss. In such case it is clear that the loss is total, because if the voyage had been pursued and completed, the articles insured would have ceased to exist, and thus been totally lost within the meaning of the policy at the port of destination. The sale, therefore, at the intermediate port, does not at all change the rights of the parties under the policy, but saves something for the benefit of the insurers, which would otherwise be wholly lost. *Parry v. Aberdeen*, 9 B. & C. 411; *Poole v. Protection Ins. Co.*, 14 Conn. 47; *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 221; *Williams v. Cole*, 4 Shepl. 207.

"The evidence in the present case leaves no room for doubt that the ice being necessarily removed from the hold in which it was carefully packed in non-conducting substances and landed at Bahia, in a tropical climate, within a short distance of the equator, could not have been re-shipped. It must inevitably have perished there. The loss was therefore total, and the sale being fully justified by the circumstances, constitutes no bar to the plaintiff's claim. The proceeds are to be treated as salvage for the benefit of those upon whom the loss must ultimately fall."

For a like reason, when memorandum articles are reduced to such a

condition by sea damage that they cannot be carried forward to their destination without breeding an infection on board the vessel, they may be sold at an intermediate port, and the insurers held answerable for a total loss. *Hugg v. The Augusta Ins. Co.*; *Poole v. The Protection Ins. Co.*; *Roux v. Salvador*. Under these circumstances, the goods cannot be kept or forwarded with safety to life and health, and may be thrown overboard, or sold to the highest bidder. *Depeyster v. The Sun M. Ins. Co.*, 19 New York, 272.

A similar rule prevails where freight is insured free from average, and renders the loss total when the vessel is irreparably injured, and the expense of forwarding the goods in another vessel would equal the freight due under the original agreement. *Willard v. Miller's Ins. Co.*, 30 Mo. 35; *Hugg v. Augusta Ins. Co.*, 7 How. 595. But it would seem to be well settled in the United States that a loss of the ship will not be a total loss of the freight within the memorandum, or under the policy at large, if another vessel can be procured, and the cargo forwarded to its destination for less than the freight due for the whole voyage. *Kinsman v. The New York Ins. Co.*, 5 Bosworth, 460. If the means of transportation appear to have been at hand, it is for the insured to show why they were not employed, but he is not bound to bring a ship from a distant port unless there is sufficient ground for believing that she will arrive in time. *Treadwell v. The Union Ins. Co.*, 7 Cowen, 270. A different view is taken in England, under which the loss of freight will be total if the goods are not transhipped, and the expense of the transshipment may be recovered as salvage if they are. *Ridston v. The Empire M. Ins. Co.*, 2 C. P. L. R. 357.

All the authorities agree that the retardation of the voyage or deterioration of the cargo through the perils of the sea, will not be a loss of goods or freight insured free from average, if the goods can be sent forward in specie without an additional expense equaling their value. *Navonne v. Haddon*, 9 C. B. 30; *Hugg v. The Augusta Ins. Co.*, 7 How. 595. It will make no difference in the application of this principle that the goods are so much injured as not to be worth the freight agreed on, because this neither exonerates the ship-owner from the obligation to carry the cargo, nor the shipper from the obligation to pay the freight. *McGaw v. The Ocean Ins. Co.*, 23 Pick. 405; *Lord v. The Neptune Ins. Co.*, 10 Gray, 109, 114. It was said by Shaw, C. J., in the case last cited, that "the rule as between shipper and ship-owner is that if the goods arrive at the port of destination, *in specie*, capable of being delivered, the owner has carried and is entitled to receive his freight, although they are so deteriorated by sea damage or otherwise that they are of no value. If the goods are carried and ready for delivery, the underwriter on freight has made good his guaranty. If the goods have sustained damage by perils of the sea the owner of them must



look to his underwriter on goods, unless he stands his own insurer; the carrier cannot look to the insurer on freight. The question, therefore, is not whether the flour, grain and other articles would have been of any or what value, or of sufficient value to pay the freight, but whether on such reshipment and arrival they would have remained *in specie* as flour, wheat, bacon, palm leaf, &c. If so, then it is clear that they were not so totally lost that the plaintiffs were prevented by the perils insured against from carrying them and earning the freight on them."

It is well settled in general that the insured cannot recover for a total loss of property which still exists, without giving notice of abandonment in due season to enable the insurers to take measures for their own protection and the recovery of the goods or vessel (ante, 688). *Anderson v. The Royal Exchange Ins. Co.*, 7 East, 38; *Knight v. Faith*, 15 Q. B. 649; *Pearce v. The Ocean Ins. Co.*, 18 Pick. 83; *Thomas v. The Rockland Ins. Co.*, 45 Maine, 116.

This rule was elaborately vindicated by Lord Campbell, in *Knight v. Faith*, and said to apply even when the vessel cannot be repaired where she lies for want of the necessary means, nor carried elsewhere for repairs with safety.

The doctrine operates with peculiar stringency where average losses are excepted from the contract, by compelling the insured to give a timely notice of abandonment, or forfeit all right to indemnity. *Anderson v. The Royal Exchange Ins. Co.*, 5 M. & S. 477; *Cologan v. The London Assurance Co.*, *Ib.* 449; *The American Ins. Co. v. Francia*, 9 Barr, 390; *Roux v. Salvador*, 1 Bing. N. C. 526; 3 *Id.* 226.

A recovery was accordingly denied on this ground by the court below, in *Roux v. Salvador*, but the judgment was subsequently reversed in the Exchequer Chamber, because the hides, which formed the subject of the policy, had been sold by the master, under an authority dictated by necessity. Such a sale was said to be an actual total loss, divesting the title of the insured and leaving him nothing to abandon. This argument might be stronger in the case of a hostile capture than in that of a sale because the insurers are entitled to the price and may lose the opportunity of collecting it by delay. The doctrine of the Exchequer Chamber seems not to have been shaken in England by the observations of Lord Campbell, in *Knight v. Faith*; see *Farnsworth v. Hyde*, 18 C. B., N. S. 835, 857; and it has been recognized or followed on several occasions in the United States as applicable both to the goods and the vessel. *Poole v. The Protection Ins. Co.*, 14 Conn. 47; *Lord v. The Neptune Ins. Co.*, 10 Gray, 109, 115; *The Maryland Ins. Co. v. Cohen*, 3 Gill, 459; *Fuller v. The Kennebeck Ins. Co.*, 31 Maine, 325; *The Patapsco Ins. Co. v. Southgate*, 5 Peters. In other instances, however, the courts have held in accordance with the opinion of Chief

Justice Tindal, that an abandonment is a condition precedent, without which a recovery cannot be had for a constructive total loss of a ship or cargo which is not actually destroyed. *The American Ins. Co. v. Francia*, 9 Barr, 399; *The Man. Ins. Co.*, 7 Metcalf, 448; *Heebner v. The Eagle Ins. Co.*, 10 Gray, 109, 135. It seems to be generally conceded, that unless the title to the goods is divested in consequence of the peril on the one hand, or they are destroyed by it on the other, there can be no recovery under the memorandum without an abandonment. *Knight v. Faith*, 15 Q. B. 649, 662; *Roux v. Salvador*; *The American Ins. Co. v. Francia*. Partial losses are excepted by the terms of the proviso, and the plaintiff cannot declare on the loss as constructively total. The hardship of making the right to indemnity depend on what is not unfrequently a mere form; see *Graves v. The Washington Ins. Co.*, 12 Allen, 391, was shown by Lord Abinger, in *Roux v. Salvador* (ante), and in *Lord v. The Neptune Ins. Co.*, 10 Gray, 109, 115, it was said by Shaw, C. J., that when the cargo could not be carried to its destination, in consequence of damage occasioned by a peril of the sea, the loss was actually not constructively total, and the insurers were answerable without an abandonment. Under such circumstances, the goods were as effectually and completely destroyed for all the purposes of the contract as if they had been struck with lightning and consumed. The decision in *Roux v. Salvador* was on this ground, and not because the title of the insured had been divested by the sale. This dictum may be in accordance with the object of the memorandum, which was introduced from the difficulty of distinguishing between damage occasioned by the perils of the sea, and that arising from the natural tendency of perishable goods to deterioration. But it hardly meets the case of a constructive total loss of the cargo, arising from an irreparable injury to the vessel, or when the cost of forwarding the goods would exceed their value.

The effect of not abandoning is in general to limit the right of compensation to the actual injury, and the question whether a particular loss is within a clause excepting average losses, should depend on the nature of the loss, and not on the steps taken to obtain a remedy. If the loss is partial it cannot be taken out of the memorandum by abandoning. If it is in any just sense total, it should not be brought within the memorandum by the failure of the insured to give notice of abandonment in due season.

The line of demarcation between total and partial loss is clearly drawn in France. The causes for which the insured may abandon, were enumerated and defined by the ordinance of Louis XIV., and again in the present commercial code; Valin, liv. 3, tit. 6, art. 46; Code de Com., liv. 2, tit. 10, art. 36; and are treated as essentially distinct from merely average losses. It is, however, left to the insured to de-

termine, whether he will abandon and recover for a total loss, or proceed for a partial loss, without abandoning. And such an election may be made, even when average losses are excepted from the insurance, on the ground, that when the nature of the injury is within the terms of the policy, it is not taken out of them, by limiting the demand to an indemnity for the actual amount of the loss. The French tribunals gave this construction to the ordinance of the marine, and the principle was retained in preparing the present code. Emerigon, ch. 12, sect. 46; ch. 17, sect. 2, § 3; Pardessus, Cours de Droit Commercial, Tome 3, No. 858; Code de Commerce, liv. 2, tit. 11, art. 409. This rule may justly be preferred to that prevailing in England and the United States. The original meaning of the word *avarie*, or average, which it still retains in the policy of insurance, was that of injury or damage, as distinguished from entire destruction or total loss. The clause free from average, consequently, exempts the insurers from liability for injuries which are neither actually nor constructively total. Whether a casualty is within the terms of this exception, should therefore depend upon its nature, and not on the name given to it by the insured. The object of the memorandum is to afford protection against a deterioration arising from natural causes, and not to exclude injuries that are manifestly inflicted by the perils of the sea. And there is nothing in the language of the clause indicating an intention to compel the insured to choose between proceeding for a total loss, and a forfeiture of the right to be indemnified for the actual damage. Such a rule can serve no good purpose, as it regards either party to the contract of insurance.

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## WARRANTY OF SEAWORTHINESS. .

## PRESCOTT AGAINST THE UNION INSURANCE COMPANY.

IN ERROR. .

In the Supreme Court of Pennsylvania.

MARCH TERM, 1836.

[REPORTED, 1 WHARTON, 399-408.]

*The want of seaworthiness in a vessel, at the commencement of the voyage, will be a sufficient defence to the insurers on the vessel, although she arrived in safety at her port of destination.*

*Where the question was as to the seaworthiness of a vessel, in an action by the insured against the insurer, and there being no contradictory testimony as to the facts, the judge charged the jury, that "if the facts are stated in the protest, that the vessel began to leak as soon as she began to sail, or soon after, and continued to leak up to the time of the storm, or any fortuitous accident, and would, in consequence thereof have required repairs, although there had been no storm, then the law says she was unseaworthy," it was held that the law was correctly laid down to the jury, and that the court was right in not leaving it to the jury to presume unseaworthiness or otherwise.*

THIS was a writ of error in the District Court for the city and county of Philadelphia, to remove the record of an action of covenant brought in that court by David W. Prescott against the Union Insurance Company of Philadelphia.

The action was upon a policy of insurance for \$1,500, dated the 30th of June, 1830, executed by the defendants upon the schooner James Munroe, at and from Philadelphia, to the Island of St. Thomas, and back to a port of the United States, with liberty of St. Jago or Porto Rico. The claim was for a partial loss, incurred, as the plaintiff alleged, in consequence of a gale of wind; and the only question was the seaworthiness of the vessel.

The evidence produced on the trial by the plaintiff, consisted of

the deposition of the captain and mate, the protest made by them, the report of the surveyors, and the testimony of two other nautical persons. The captain testified that the vessel sailed from Philadelphia on the 1st of July, 1830; that she was then sound and seaworthy. From the 4th to the 9th of July, she leaked, so as to require occasional pumping. On the 9th, a gale of wind came on, with a heavy sea, by which the leak increased considerably, making 300 strokes per hour, carried away the main-boom and topping lift, the vessel straining much, and the pumps constantly going. The worst of the gale continued about thirty-six hours. On his cross-examination, he said, that the leak was rather increasing previously to the gale, but never so as to cause alarm. If a vessel leaked on an average 200 strokes per hour, it would be a great state of leakiness; if 250 strokes per hour, it would have required something to be done before it would be safe to go to sea again. If there had been no gale, and she had continued to leak during the passage, as she did on the day before the gale, then, at a place like St. Thomas, he would have considered it best and necessary to have her looked at before going to sea again. With a cargo such as fustic, which would not be injured by wet, he would not have been afraid to risk himself on a voyage home in her again, without having anything done to her; but he would not have taken a cargo of ordinary merchandise. She did not leak much on her homeward voyage. She had been caulked on deck, and under deck, at St. Thomas. The *protest*, which was sworn to at St. Thomas, on the 20th of August, 1830, set forth the copy of the log-book, from which it appeared that the vessel left the capes of the Delaware on the 4th of July, on which day they had pumped the ship every half-hour. On the 5th the same entry appeared, "she making at her pumps 200 strokes per hour on the average." On the 8th, it is said, "we find our leak increasing, it having required 250 strokes at the pump every half-hour; therefore we pump ship every fifteen minutes." On the 9th the gale commenced, during which the pump made 300 strokes per half-hour, and on the next day the ship was pumped every five minutes. On the 12th of August she arrived at St. Thomas, where a survey was held upon her. The surveyors reported that they "found her very open outside and in, above water; found the partners of her mast much strained, and the break of her quarter-deck open;" and they recommended "her being caulked and paid inside and out, the stern sheathed, her

chain bolts backed out and made larger, her sails repaired, and two coils of rigging furnished for her halyards and lanyards." She was accordingly repaired at an expense of \$187.68. A captain of a vessel, called on the part of the plaintiff, said that he did not know that he should consider 200 strokes per hour as anything more than common leaking. He had been in vessels that required that quantity of pumping, and would not consider them unseaworthy; and he had been in a vessel that leaked at the rate of 250 strokes in an hour, without being afraid to go in her. Another nautical witness testified to instances of vessels leaking 250 to 300 strokes per hour, that were otherwise sound. On the part of the defendant, a witness was called, who said he had been a *dispatcheur* for seventeen years, and upon the facts stated in the protest, would consider the vessel unseaworthy.

The evidence having been closed, the judge charged the jury, as follows:

This is a mere question of property, to be decided without excitement, and according to law and evidence. But for what has fallen from counsel, I would not caution the jury on this head. The counsel, it is true, disclaim all intention to prejudice the jury, or to allege that a different view is to be taken of the rights of an individual, from that which would be taken of the rights of an incorporated company; but yet, the remarks of counsel have had such a tendency, that I feel it my duty to make these observations, however I may regret the necessity of doing so.

Insurance is a contract, whereby, for a stipulated consideration, called a premium, one party, called the insurer, undertakes to indemnify the other, called the insured, against certain risks.

The *subject* in the present case was the *ship*, being a schooner, called the James Munroe; the *risk* insured against, and now in question, the *perils* of the sea.

The *voyage* was a voyage from Philadelphia to St. Thomas.

The *claim* is for a partial loss, alleged to have been occasioned by the perils of the sea.

Good faith is the basis of this contract; and the mere act of effecting insurance, is a pledge on the part of the assured, that certain facts are true; thus, where the parties have omitted to say anything about *seaworthiness*, the mere effecting the policy, carries with it an *implied warranty* on the part of the insured,

that the vessel is seaworthy. If it turns out that the ship was not seaworthy at the commencement of the risk, the condition on which the liability of the underwriter depends, is forfeited ; and it is, so far as the responsibility of the insurer goes, as if no contract had been made ; and this is true, whether the unseaworthiness were known to the insured or not. It is not necessary to impute a fraud to him. The rule is the same, even though the unseaworthiness arises from some latent defect which the assured had no knowledge of, and could not have discovered or prevented.

These principles are well settled ; they are founded in good reason, having in view the protection of life and property.

The idea of seaworthiness is not limited to the sufficiency of the vessel merely to save the lives of the persons who may be on board, but extends, also, to her sufficiency for the safety of the property on board of her. The vessel must be sufficiently staunch and sound for the employment and situation intended by the insurance. She must be in a suitable and fit condition to carry the cargo put on board, or intended so to be.

It is not disputed, that on the arrival of the schooner at St. Thomas, certain necessary repairs were made, and that they, with incidental expenses, amounted to \$204.68 ; the sum which, with interest, is claimed by the plaintiff in this suit.

The defence here, is, that the vessel was unseaworthy at the commencement of the voyage ; and the defendant's counsel contend that the testimony in the case fully proves this. It is clear that the underwriters are not liable for the wear and tear of the voyage ; the mere ordinary working and straining of the vessel, any more than for an insufficiency or inherent defect in her. A portion of the repairs, as appears by one of the vouchers produced by the plaintiff, was in consequence of leaking or springing a leak ; and in such a case, the law lays down certain rules, which are obligatory upon the parties, and which are to be enforced by courts and juries.

Though the general presumption of the law is, that the vessel is seaworthy, and the party alleging unseaworthiness, must, in most cases, show it ; yet, where springing a leak has given occasion for the repairs, the burthen of proof is thrown upon the insured ; as repairs, from such a cause, are not usually considered as covered by the liability of the underwriters. The assured must, in such a case, show that the damage, for which he has a

claim, is the direct effect of a fortuitous accident. In the absence of such proof, the springing of a leak is to be attributed, either to the working and straining of the vessel, which is the wear and tear of the voyage, or to some insufficiency or inherent defects; for neither of which are the underwriters liable; and if the vessel spring a leak soon after the risk commences, without any apparent cause from the perils insured against, especially when it satisfactorily appears that no accident happened to occasion the damage or defect, the marine law infers, that she was defective at the beginning of the risk, and not seaworthy. The rule must be at least as strong where the leak commenced with, and continued through the voyage. If the vessel was unseaworthy at the commencement of the risk, it is immaterial whether or not the subsequent injury was in any degree occasioned by the storms or gales mentioned in the protest. If the case of 1 Johns. 241, is opposed to these principles, it is not law with us. It could be distinguished, however, from a case like the present; but it is unnecessary to point out the differences.

Then what are the facts here?

The protest is by our law evidence: but it is liable to explanation; and the formal printed part of it is not to be allowed weight against the substantial and written part of it, and the testimony of the persons who signed it, when taken according to law, subject to cross-examination.

The power of the jury relates to the facts. The extent to which it may, with propriety, be exercised, can hardly, I presume, form the subject of controversy. If the facts are clear and undisputed, and the law has laid down rules for the government of us all, in regard to such state of facts, all appeals to the jury to disregard the law, as explained by the court, are to be avoided; inasmuch as they impute to a jury a disposition to set up a standard for themselves, different from that by which all classes of men are protected in a civilized and enlightened community, and are positively mischievous, if responded to in the spirit in which they are made; because the law will not lend itself to sustain such an answer; and the parties are necessarily put to the trouble and expense of another investigation, where the law most assuredly will control every branch of the tribunal, which it has created to carry out its own purposes.

If the facts are as stated in the written protest—that the vessel began to leak as soon as she began to sail, or soon after, and con-



tinued to leak up to the time of the storm, or any fortuitous accident (and would, in consequence thereof, have required repairs, although there had been no storm), then the law says, she was *unseaworthy*, and the defendants are not liable in this suit. If there were any other facts contradicting these, they might certainly weigh them, and find accordingly, and if they satisfied you that the vessel was seaworthy at the commencement of the voyage, a different result would be required. In the absence of such other facts, the rule of law must prevail.

The jury, after being out some time, returned, and inquired of the court :

“Whether the law pronounces the fact of the vessel leaking at the time of, or soon after her leaving port, decisive of the question of her seaworthiness ; or whether this question is left open for the jury to decide, from their judgment, on all the circumstances?”

The court answered as follows :—“If the facts are, as stated in the written protest, and she began to leak as soon as she began to sail, or soon after, and continued to leak up to the time of the storm, or any fortuitous accident (and would, in consequence thereof, have required repairs, although there had been no storm), then the law says, she was *unseaworthy*.”

The jury found thereupon for the defendants, and the plaintiff took a writ of error, and having removed the record to this court, assigned the following errors :

The court below erred in their charge to the jury, in the following points :

First. That when springing a leak has given occasion to repairs, the burthen of proof of seaworthiness is on the insured, as such repairs are not usually considered as covered by the policy ; the insured must show that the damage is the direct effect of accident.

Second. That if a vessel spring a leak soon after the risk commences, without any apparent cause, the law infers *unseaworthiness* at the beginning of the risk, and the subsequent injuries by storm, are immaterial.

Third. That the printed formal part of the protest is to have no weight against the substantial and written part, and the testimony of those who signed it.

Fourth. That if the facts are, as stated in the written protest, that the vessel began to leak as soon as she began to sail, or soon

after, and continued to leak up to the time of the storm, and would, in consequence thereof, have required repairing, although there had been no storm, then, the law says, she was unseaworthy.

Fifth. The court erred in taking from the jury, indirectly, the decision of the facts:

- 1st. By censuring the plaintiff's counsel for addressing the jury as the judges of the fact of seaworthiness.
- 2d. By the whole tenor and drift of the charge, assuming to the court the decision of that question upon their view of the facts, as one of mere law.
- 3d. By restricting the jury to the facts stated in the written part of the protest.
- 4th. By putting those facts to the jury as clear and uncontradicted, and as establishing unseaworthiness.
- 5th. By intimating to the jury, that a verdict against the court's opinion on the question of seaworthiness, would be nugatory.

Sixth. The answer of the judge to the question of the jury, was evasive. The question was direct: "Whether the law pronounces the fact of the vessel leaking at the time of, or soon after her leaving port, decisive of the question of seaworthiness?" This should have been answered "*yes*" or "*no*." But the judge complicates his answer with the circumstance of her requiring repairs, and leaves the actual question unanswered, except by implication.

Seventh. The judge erred in stating in his charge, as applicable to this subject: "that the idea of seaworthiness is not limited to the sufficiency of the vessel merely to save the lives of the persons who may be on board, but extends also to her sufficiency for the safety of the property on board of her."

Mr. *F. W. Hubbell* and Mr. *Haly*, for the plaintiff in error.

The question is, whether the circumstance of a vessel being leaky, is sufficient to deprive the insured of compensation for injury suffered by reason of a storm. The judge ought to have left the question of seaworthiness to the jury as one of fact, instead of deciding it as a matter of pure law. Even as a question of mere law, there is error in the charge. Had this been an insurance on the cargo, it would have been right; but the insurer on the ship had nothing to do with her capability to transport a cargo of flour without damage. The true proposition is, was the vessel sufficient

for her own preservation. There is error in the answer to the application of the jury. They ought to have been told, that if the vessel was leaky *to such an extent as to require repairs*, she should be considered unseaworthy. There is no authority to support the position, that a leak makes a vessel unseaworthy. The experience of the nautical witnesses proves that this cannot be the case. It will be found, that in all these cases, "seaworthiness" and "navigability" are convertible terms. *Bell v. Reed*, 4 Binn. 130; *Cormack v. Gladstone*, 11 East, 346; 1 *Condy's Marshall*, 154, 476; *Park on Ins.* 220, 221, n; *Patrick v. Hally*, 1 Johns. Rep. 244; 11 *Picker*, Rep. 56; *Taylor v. Lowell*, 3 Mass. Rep. 914; *Barnwell v. Church*, 1 *Caines's Rep.* 246; 1 *Strange*, 127; *Talcott v. Ins. Co.*, 2 Johns. Rep. 75.

*Mr. Cadwalader*, and *Mr. J. C. Biddle*, contra.

This case was decided mainly upon the plaintiff's own evidence. The effort was to make the question of seaworthiness, which is a mixed one of law and fact, altogether a matter for the jury; which the judge resisted; and his course, in this respect, is sanctioned by the authorities. *Bushel's Case*, *Vaughan's Rep.* 144; *Oneby's Case*, 2 *Ld. Raym.* 1484; *Pfountz v. Steel*, 2 *Watts*, 413, 14; *Crist v. Brindle*, 2 *Penn. Rep.* 232; *Franciscus v. Reigart*, MS.; *Stewart v. Stocker*, 1 *Watts*, 141, 2; *Malson v. Fry*, 1 *Watts*, 433; *Riddle v. Murphy*, 7 *Serg. & R.* 237, 8; 9 *Peters's Rep.* 567, 8; *Baker v. Lewis*, 4 *Rawle*, 357; *Kingston v. Leslie*, 10 *Serg. & R.* 389, 90; *Johnson v. Gray*, 16 *Ib.* 366; *Somerville v. Holliday*, 1 *Watts*, 516, 17; *Starr v. Bradford*, 2 *Penn. Rep.* 398; *Commonwealth v. Henderson*, 1 *Penn. Rep.* 401; 9 *Cowen*, 225; *Fox v. Clifton*, 9 *Bing.* 115. Then upon the law of this case, the charge was in conformity with the opinions of the best text-writers and the decisions of the court. When the vessel is shown to be defective, the burden of proof that she was seaworthy, rests upon the insured; 1 *Marshall*, 156; *Parke*, 221, n; *Stephens*, 152; *Bencecke*, 455; 1 *Phillips on Ins.* 116, 117; *Holt on Shipping*, 303; 1 *Dow's Rep.* 342, 344; *Talcott v. Com. Ins. Co.*, 2 *Johns.* 128, 130; *Annen v. Woodman*, 3 *Taunt.* 299; *Bell v. Reed*, cited on the other side, was a question of bailment disconnected with the doctrine of insurance; and in the recent case of *Hart v. Allen*, 2 *Watts*, 119, the present chief justice has shown, that the *nisi prius* opinion of Judge Breckenridge was not sustained by the court in banc.

There is no such distinction as that contended for on the other side, between the sufficiency of a vessel for self-preservation and for the preservation of the cargo. *Abbott v. Brown*, 1 Caines's Rep. 292; 1 Phillips on Ins. 110; *Hughes on Ins.* 205.

The opinion of the court was delivered by

SERGEANT, J. The legal principles in relation to seaworthiness of vessels insured, are clearly and succinctly stated in the opinion of the (now) president of the District Court, brought up with this record. The plaintiff insists, that the doctrine on the subject is not applicable to the present case. He admits the law to be as laid down in the authorities, that if a vessel sail on her voyage, and in a day or two becomes leaky, and founders, or is obliged to return to port, without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not seaworthy when she sailed. *Munro v. Vandurn*, Park's Ins. 224; *Talcott v. Marine Ins. Co.*, 2 Johns. Rep. 124. But he contends, that if she perform the voyage, and arrive at her port of destination, she is to be deemed seaworthy, as between the insurer and the insured on the vessel, whether such leakiness has occurred or not. This would subvert the rule as to seaworthiness altogether, and make it depend, not on the state and condition of the vessel at the time she sails, but on the event. It would substitute an unfair and dangerous test, in lieu of the wise and salutary requisitions imposed by the law; for the best-provided vessel may meet with misfortune, and founder at sea, or be compelled to return to port. On the other hand, a weak and insufficient ship may attempt the voyage, to the imminent danger of the lives and property on board, and yet escape destruction almost by a miracle. It is not by events that human affairs are to be judged. Experience teaches us, that in a vast majority of these cases, unless due precautions are taken, disaster will ensue; and therefore the law requires it of the insured, as a condition precedent to the attachment of the contract of insurance, that the vessel at her departure from port be tight, stanch, and strong, well fitted, manned, and provided with all necessary requisites to meet the perils of the ocean, which she is to encounter in her voyage. And the inquiry is not, after the voyage is ended, has she escaped, notwithstanding the gross neglect of all that prudence dictated for her preservation? but was she equipped and fitted out as she ought to have been?

If she was not, she was not seaworthy—not worthy or fit to go to sea: not in a condition to meet and resist its perils. A contrary doctrine would tend to throw on the insurer the expense of repairs, which the insured himself ought to have disbursed before the vessel sailed. Besides, a vessel tight, stanch and strong, and in good sailing condition, will pass, without harm, through assaults which would materially damage a leaky and infirm ship. The latter is not only less able to resist the shocks of the winds and waves, but the crew are exhausted by the necessity of pumping, and, therefore, incapable of performing their duty, when great exertions become necessary. She is not, therefore, so well manned as she otherwise would be. Nor is it wise or safe to tempt owners and shippers to run into danger, when unprovided to meet it. The disasters of mariners—not unfrequently of the most dreadful and appalling character—ought not to be multiplied, by stimulating them into unnecessary experiments, how far they dare venture in a leaky vessel. The law casts her mantle of protection over them, as well as the interests of the shipper, by declaring that no insurance on the vessel is valid, if she is put to sea in an unseaworthy state; and it is of importance to the great interests embarked in commerce, as well as to the preservation of life, that the requisitions of the law in this respect should not be relaxed. The owner should be obliged to perform his duty, and be induced to attend to that, which he alone can attend to, the state and condition of his vessel, and to place her, under the guaranty of the policy, in a condition fitted to meet those perils of the sea, which the insurer takes upon himself. If he does not, he throws on the insurer other perils not within the contract: perils which do not the less exist, because, by good fortune, they may happen not to prove fatal: and which may, of themselves, produce an average loss, without foundering the ship or defeating the voyage. If the owner does not choose to do this, or even if it occur without his knowledge or default (and the same rule applies to policies on goods), there is no contract: the consideration fails, and the risk remains with the party himself. We are, therefore, of opinion, that the doctrine is applicable, notwithstanding the vessel reaches her port of destination; if it sufficiently appear, by the evidence, that the vessel sailed in a leaky state, and in want of repairs. And this is the point of view in which the court below put the case to the jury.

2. Nor is there any foundation for the complaint, that the court

took the facts from the jury, or assumed more than they ought legally to have done in charging them. The court applied the rule of law to the facts as they appeared, at the same time instructing the jury, that if there were contradictory facts, they might consider them, and the result would be different. There were, however, no contradictory facts shown, and the court would have erred to leave it to the jury to presume facts, without any evidence, from which such presumption could legally be drawn. "To submit a fact destitute of evidence," says C. J. Gibson, in *Stouffer v. Latshaw*, 2 Watts, 167, "as one that may nevertheless be found, is an encouragement to err, which cannot be too closely observed, or unsparingly corrected." To the same effect, is the opinion of the court delivered by Mr. Justice Rogers, in *Star v. Bradford*, 2 Peun. Rep. 398. Here the evidence was clear, that from her departure, this vessel, with constant light breezes, leaked; that the leak continued increasing for nine days, so that the hands were obliged to pump, at first, every hour, and then every half hour, and then every fifteen minutes: afterwards a storm commenced, and the vessel labored much, and shipped great quantities of water, till they had to pump every five minutes, and she continued very leaky, damaging the cargo, until her arrival. No evidence was given by the insurer to account for this state of the ship: there was no violence of wind or wave till the ninth day; there was not time for the ordinary working and straining of the timbers to produce a leak: and the inevitable presumption is, that she had an inherent defect at the time of sailing. This is the legal presumption, and so stated in the authorities, and elementary writers; and the court, in laying down the law to the jury, could not do otherwise than state that legal presumption on the facts existing. Upon the whole, the charge of the court is, in the opinion of this court, correct, and the judgment must be affirmed.

Judgment affirmed.

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The liability imposed by the contract of insurance, is limited to the perils enumerated in the policy, and does not extend to losses occasioned by the inherent weakness or imperfection of the thing insured. Nor, where a marine insurance is in question, will the policy of the law permit the owner of the vessel to stipulate against the consequences of his own wrong or negligence, in sending her to sea in a state unfit for service, or which necessarily endangers the safety of those on

board. *Wilkie v. Geddes*, 3 Dow. 60 (ante, 765). Accordingly, the courts of England and of this country, concur in holding the seaworthiness of the vessel a condition precedent without which a marine insurance will be void, whether the defect arises from the default of the owners of the property insured, or from circumstances wholly beyond their control. *Draper v. The Commercial Ins. Co.*, 21 New York, 378; *Rosenheimer v. The America Ins. Co.*, 33 Missouri, 230, 236; *Thompson v. Hopper*, 6 Ellis & Bl. 171, 188. It follows, and the decision in the principal case shows, that when unseaworthiness is established by sufficient evidence, further inquiry becomes superfluous, and the insurers will be discharged, although the loss may have been occasioned by causes independent of the unfitness of the vessel for the voyage. The same result will follow where the insurance is upon the cargo, because the point is one of such vital importance; that the law has deemed it expedient to lay down an inflexible rule, rendering it the interest of all concerned, to see that all the usual and proper precautions are taken to secure the safety and success of the voyage. *Warren v. The United Ins. Co.*, 2 Johnson's Cases, 231; *Watson v. Clark*, 1 Dow. 336; *Taylor v. Lowell*, 3 Mass. 331; *Paddock v. The Franklin Ins. Co.*, 11 Pick. 227; *Howard v. The Orient M. Ins. Co.*, 2 Robertson, 339.

The principle extends to everything which forms an essential part of the equipment of the vessel, or which is necessary to render her adequate to meet the perils to which she will unavoidably be exposed. Hence, the hull must not only be reasonably tight and sound (*Paddock v. The Franklin Ins. Co.*, 11 Pick. 227; *Watt v. Morris*, 1 Dow. 32; *Douglas v. Scougal*, 4 Id. 269) but the rigging and sails in good order; *Weddenham v. Bell*, 1 Campbell, 1; and the vessel sufficiently supplied with cables and anchors, to resist the stress of the winds and waves under ordinary circumstances. *Wilkie v. Geddes*, 3 Dow. 57. And for the same reason, a boat which depends for its motive power on steam, will not be seaworthy, unless the boilers and furnaces are in a condition to perform the functions for which they are designed, and the machinery in general reasonably sufficient for the propulsion of the vessel. *Myers v. The Girard Ins. Co.*, 2 Casey, 192.

Nor will a vessel be seaworthy, unless she is supplied at the outset of the voyage with a sufficient quantity of water, provision, fuel and other necessities, to last, under ordinary circumstances, from the time of her departure until she reaches the port of destination; *Howard v. The Ocean Ins. Co.*, 2 Robertson, 539; and in *Fontaine v. The Phoenix Ins. Co.*, 10 Johnson, 48; the insurers were held to be exonerated, on the ground that the ship had put to sea with an inadequate supply of oil and candles, which was exhausted during the

voyage, and was consequently compelled to lie-to at night, from the impossibility of consulting the compass, as a guide to her course.

The crew must also be sufficient in numbers and the officers possessed of the requisite nautical skill. *Draper v. Commercial Ins. Co.*, 21 N. Y. 378; *Keeler v. The Firemen's Ins. Co.*, 3 Hill, 255; *Copeland v. The New England Mut. Ins. Co.*, 2 Metcalf, 432. If however the person who actually navigates the vessel, is competent to the task, it is not indispensably necessary that he should be named in the registry as master. *Draper v. The Commercial Ins. Co.*, 21 New York, 378. But Comstock, Ch. J., dissented from this conclusion, on the ground that a vessel could not justly be termed seaworthy, when the person who was really in command had no legal authority, and the person legally authorized wanted the requisite knowledge.

It seems to have been thought in *Weir v. Aberdeen*, 2 B. & Ald. 320, that the unseaworthiness of the vessel at the outset of the voyage, will not avoid the policy, if the deficiency is discovered and remedied soon afterwards, and before it results in actual injury. But the point actually decided was, that the departure of the vessel in an unseaworthy condition, may be excused by her return to port, and the subsequent consent of the insurers, that the policy should attach after the removal of the defect, as if it had never existed; and the better opinion would seem to be, that when no waiver is proved, the breach occasioned by unseaworthiness at the outset of the voyage, cannot be cured, by removing the defect before it has resulted in actual injury. 1 Arnould on Insurance, 652.

Seaworthiness, however, is essentially a relative and technical term, which simply expresses the fitness or sufficiency of the vessel for the position in which she is placed, or the duty which she is actually called upon to perform, and has no necessary connection with her readiness to go to sea, or ability to encounter the perils of the ocean. *Burgess v. Wickham*, 3 Best & Smith, 669; *Knill v. Hooper*, 2 H. & N. 217. All that it means, and all that can reasonably be required, is, that the ship should be fit for the purpose for which she is employed, at the time when the question arises; and if this requisition is satisfied on the part of the insured, the insurers cannot complain of her inadequacy to meet dangers of another kind. A vessel may be seaworthy for a voyage to Rio Janeiro, but not to Nova Zembla or Baffin's bay; or for a short passage, and not for a long and difficult navigation; to descend a river or follow a line of coast, but not to cross the ocean. *Knill v. Hooper*, 2 H. & N. 277, 282. It has been said that seaworthiness is that state in which a prudent owner, uninsured, would put the ship relatively to the end in view, and if so it must necessarily vary in each instance, with the service for which the ship is intended, and the perils to which she may be exposed. *Burgess v. Wickham*, 3 Best & Smith,



669, 692. *Gibson v. Small*, 4 H. L. 455, 484. In determining whether a vessel is seaworthy, all the circumstances of the case must consequently be taken into view, and the question will not be so much whether she was able to make the voyage, as to whether all was done that prudence dictated, and the nature of the case would allow to render her fit to encounter the perils that might arise in the course of the navigation. If she is a steamer the condition of her boilers may be more important than that of her masts and rigging; if her course will lie among the ice, more than ordinary strength should be given to the hull; if she is to navigate a river, it may be necessary to inquire whether the pilot or master is acquainted with the shoals or rocks that impede the channel; and it has been intimated, and apparently with truth, that the standard of seaworthiness may vary, not only with the nature of the vessel and the character of the voyage, but with the advance of science and the mechanic arts, and that when new and improved methods of construction have been brought into use, it will not be safe or prudent for the ship owner to pass them by, in view either of his obligation to the shipper or the enforcement of his remedy against the insurer. See *Tidmarsh v. The Washington F. & M. Ins. Co.*, 4 Mason, 439; *Burgess v. Wickham*, 3 Best & Smith, 693.

"If," said Parke, Baron, in *Dixon v. Sadler*, 5 M. & W. 405, "the insurance attaches before the voyage commences, it is enough that the ship be commensurate to the then risk, and if the voyage be such as to require a different complement of men or state of equipment, in different parts of it, as if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it." Thus, a vessel may be sufficiently manned and equipped, and in all other respects adequate to a passage across a lake, or down a tranquil river; *Cobb v. The New England Ins. Co.*, 6 Gray, 192; *Thompson v. Hopper*, 6 Ellis & Bl. 172, 181; *Walsh v. The Washington Ins. Co.*, 3 Robertson, 202; *Bell v. Reed*, 4 Binney, 127, 139; and yet, entirely unfit to encounter the perils incident to a more exposed and boisterous navigation; while the actual prosecution of a voyage, obviously requires a different state of preparation, from that which is requisite for lying at a dock, or in a well sheltered harbor. *Thompson v. Hopper*, 6 Ellis & Bl. 171, 181. Indeed, the exigency of the case may demand, and the contract of insurance consequently permits, that the repairs necessary to fit a vessel for sea, should continue down to the last moment of her stay in port; and it would be absurd to require, that the sails and rigging should be in readiness, or the crew on board, at a time when she does not need the services of the one, and cannot make any use of the others. *Cobb v. The New England Ins. Co.* Hence, an insurance at and from a port, will not be vitiated by

proof that the vessel was not fully manned and equipped while in harbor, or that she underwent repairs or alterations after the risk commenced, and before going to sea; nor will it be an answer to an action on a policy on one voyage or risk, to show that something was wanting which would have been necessary in another. *Treadwell v. The Union Ins. Co.*, 6 Cowen, 270. The law was so held, at a comparatively early period, by Lord Kenyon, in *Forbes v. Wilson*, Park on Insurance, 299; and again, in *Smith v. Surridge*, 4 Espinasse, 25; and the rule is established on this basis in England and the United States.

In *Thompson v. Hopper*, 6 Ellis & Bl. 172, 181, Erle, J., said, that in a whaling voyage to the North the warranty had four gradations, fit for dock in London, fit for river to Gravesend, fit for sea to Shetland, then fit for whaling. And when a ship was insured at and from a port on a river, with liberty to stop at another port lower down the stream, the plaintiffs were allowed to recover for a loss occurring subsequently at sea, although it appeared that she was unfinished when towed from the first port where she had been built, and not rigged or equipped until she reached the second. *Cobb v. The New England Ins. Co.*, 6 Gray, 192. The question arose in *McLanahan v. The Universal Ins. Co.*, 1 Peters, 170, 183, where one of the defences set up by the insurers was, that the vessel left the dock and got under weigh while the master and part of the crew were still on shore, and had consequently been compelled to stand off and on until they came on board, which was said to constitute a plain case of unseaworthiness delaying and varying the voyage, and exposing the property to dangers that might otherwise have been avoided. But the court were clearly of opinion, that if the ship had a sufficient number of men on board to take charge of her, under the circumstances, and the course adopted was in other respects safe and proper, no weight was due to the absence of the rest of the crew, or the want of a sufficient number of hands to prosecute the entire voyage with safety. "The defence," said Story, J., "is founded on the assumption, that the ship ought not to have got under weigh or proceeded into the offing, until the master and all the crew necessary, not for that act, but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what part of the crew was actually on board at the time, nor whether the voyage was absolutely intended to be commenced on that day, nor whether the departure was merely contingent and dependent upon the master's procuring the proper ship's papers, and the breaking ground, and the standing off and on, in the offing, were preparatory steps for this purpose, nor whether, for such purposes, the pilot and crew on board were not amply sufficient. But we are far from being satisfied, that the law has interposed any such rule as the argument supposes. Seaworthiness in port or for temporary purposes, such as mere change of position in

harbor, or proceeding out of port, or lying in the offing, may be one thing, and seaworthiness for a whole voyage, quite another. A policy on a ship at and from a port, will attach, although the ship be at the time undergoing extensive repairs in port, so as in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy."

The meaning and import of the word "seaworthy," and of the implied warranty of seaworthiness, were discussed in *Small v. Gibson*, 16 Q. B. 128, 152, 4 H. L. 353; where a plea that the vessel was not seaworthy, was alleged to be insufficient as simply negating her fitness to go to sea, without averring her unfitness, or want of adequate preparation for the situation in which she was placed, or the navigation in which she was engaged at the period of time to which the plea had reference. But the court held, that the term "seaworthy," has no necessary reference, in its legal or technical sense, to the navigation of the ocean, and simply means, that the vessel was reasonably adequate to the risks or perils incident to the position in which she was placed at the time when the policy attached, or the question arose. "If," said Parke, in delivering the judgment of the Exchequer Chamber, "the word 'seaworthy' means in a state completely fit for *sea* navigation at the time, the plea is certainly bad, for it is enough to satisfy the terms of the assumed implied condition, that the vessel is fit for navigation if at sea or on a river, or on the point of setting sail on either, or that she is in such a state of physical safety in a port, preparing for a voyage, as to enable her to be in reasonable security till she should be perfectly repaired and equipped for it; and in order to constitute a breach of the condition, both these alternatives must be negated. But, if the word 'seaworthy' is not to be construed according to its strict or primary signification only, but in a more extended sense, as including in it a fitness for present navigation, and that either on a sea or river, if about to sail or sailing on either, and a condition of repair and equipment fit for such a port, if she was then in port, then the plea is good; for it negatives every part of the assumed implied condition, by denying that the vessel was seaworthy. We think that such is now become, in common parlance, as applicable to this subject, the meaning of the term 'seaworthy,' there being a seaworthiness for the voyage, and seaworthiness for river navigation, or for a port." And when the case subsequently came before the House of Lords, seaworthiness was said to be that condition in which the ship would be put by a prudent owner, due regard being had to her nature, and that of the service in which she was to be employed. *Burges v. Wickham*, 3 Best & Smith, 669, 695.

This view of the law is sustained by the cases of *Taylor v. Lowell*, 3 Mass. 331, and *The Merchants' Ins. Co. v. Clapp*, 11 Pick. 56, which decide, that when a vessel is reasonably fit for the situation in which

she is placed, or the purpose for which she is used at the inception of the risk, the contract will become mutually binding, and entitle the insurers to the whole premium, notwithstanding the existence of defects in her equipment, which continue down to the time of sailing and deprive the insured of the protection of the policy during the voyage. Thus, in *Taylor v. Lowell*, proof that the hull of the vessel was unsound and leaky at the time when the cargo was put on board, and that she sailed subsequently in that condition, and was forced, in consequence, to return for repairs, was held not to be a sufficient answer to an action brought by the insurers for the premium, because she was insured at and from the port of departure, and the unseaworthiness was not such as to prevent her from lying safely in the harbor, or deprive the defendants of the right to an indemnity, for any loss which might have happened while there. It was said in like manner in *The Merchants' Ins. Co. v. Clapp*, that there was no implied warranty that the ship should be fit to go to sea at the time of receiving her cargo, and that it was enough, if her condition was such as to render her reasonably safe, where she lay. The law had been held the same way in *Annen v. Woodman*, 3 Taunton, 299, where the court said, that, as the vessel was at the risk of the insurers while lying in port, and they would have had to pay for her, if burnt or sunk while there, they were necessarily entitled to the whole premium, although she sailed afterwards without being fit to go to sea, and forfeited the protection of the policy during the residue of the period covered by the insurance. These cases show that the insured will not lose the right to an indemnity, for a loss which occurs during one stage of the risk or voyage, in consequence of the unfitness of the vessel to encounter the perils incident to another, which has not yet arrived; *Thompson v. Hopper*, 6 Ellis & Bl. 172, 181; and that a subsequent breach of the warranty of seaworthiness, will not divest rights which have accrued to either of the parties before it happened. The rule, however, has its limits, and the policy will be void from the outset, even when the insurance is "at and from," if the vessel is a mere wreck, or so entirely rotten or unsound, as to be incapable of lying safely at the port or harbor where the risk commences. *Paddock v. The Franklin Ins. Co.*, 11 Pick. 227, 232.

But while the insured is entitled to postpone the outfit of the vessel, until she is about to sail, and will not lose the benefit of a policy which attaches to the ship while in harbor, by dismantling her there, in order to prepare her for sea, it is still imperatively necessary that she should be seaworthy, or in other words fit to encounter the ordinary perils of the navigation for which she is destined, at the moment when she sails or enters upon the actual prosecution of the voyage, and if she be not, the insurance will be vitiated, and any subsequent loss

must be borne by the insured. 1 Arnould, 672; *Watson v. Clark*, 1 Dow, 336. Thus, when a ship, insured at and from Cuba to London, sailed from Cuba with a sufficient number of hands to carry her to Jamaica, but stopped at Jamaica, in order to land part of her crew there, and obtain others for the voyage to London, the insurers were held free from liability, on the ground, that if the vessel could have completed the voyage without stopping for more men, the deviation was unjustifiable, and if she could not, she was obviously unseaworthy at the time of sailing. *Forshaw v. Chabert*, 3 Brod. & B. 358; *Silva v. Low*, 1 Johnsons' Cases, 198. The same point arose in *Cruder v. The Philadelphia Ins. Co.*, 2 W. C. C. R. 262, 339, where Washington, J., was clearly of opinion that, although the master may seek a harbor, or otherwise vary the direct course of the voyage, for the purpose of making necessary repairs, without incurring the penalty attached to a deviation; yet, that this is only true, when the necessity arises from causes subsequent to the inception of the risk, and will not authorize a change of course for the purpose of supplying a deficiency which existed at the time when the policy first attached to the vessel.

Another limitation was set to the doctrine of seaworthiness, in *Burgess v. Wickham*, 3 Best & Smith, 669, where the court held that, the implied warranty will be fulfilled, if the vessel is as fit for the risk for which she is insured, as she is from her own nature capable of being made, although she may not have all the requisites usual and proper in a vessel of a different class. A policy on a river steamer, at and from any port in the river Clyde in Scotland, to Calcutta, was accordingly held valid, although she was unfit to cross the ocean, and foundered presumably from that cause at sea, it appearing that every practicable means had been used to strengthen her before sailing, and that the peculiarity of her build was, together with all other particulars, communicated to the insurers. Cockburn, Ch. J., said, that, if the insurer agreed with full knowledge of all the facts to insure a vessel which was incapable, from her size and construction, of being brought up to the standard of seaworthiness, the implied warranty must be taken to be limited by the nature of the thing to which it related, and would be satisfied if the vessel was as seaworthy as she was capable of being made. And Blackburn, J., added, that extrinsic evidence might always be given to aid the interpretation of a contract, by showing the nature of the subject matter. 1 Smith's Lea. Ca. 464, 6 Am. ed. Such evidence, is more than ordinarily appropriate where a warranty or condition is deduced by implication; but we may doubt the wisdom of any doctrine sanctioning the insurance of a vessel which is essentially unfit to go to sea. As between the shipper and the ship owner, knowledge may properly be received to exclude a warranty of seaworthiness, but it does not follow that either of them should be allowed to enforce a guaranty against

the consequences of his own folly. In *Kuill v. Hooper*, 2 Hurlstone & Norman, 278, the policy was held invalid through the unseaworthiness of the vessel, although the risk was described as being on "salvage," the ship being abandoned by her crew and taken into Terceira by the salvors, in whose behalf the insurance was effected; Pollock, C. B., saying that less might be required under such a policy, but the ship must at least be in a condition to traverse the ocean in safety.

If the warranty of seaworthiness is relative in some respects, it is absolute in others; and a failure to comply with its requisitions cannot be excused on the ground that the defect was not discovered until after the commencement of the voyage and could not have been ascertained previously by the most exact diligence. It is not a justification for the breach of a condition precedent that the party did what he could to comply with the agreement, and was prevented by an insuperable obstacle. Unless the vessel is seaworthy at the inception of the risk, the policy will not attach, and there can be no recovery for a subsequent loss. See Abbott on Shipping, 218, 5; *Redhead v. The Midland R. R. Co.*, 412, 434.

So far the authorities agree; but there is much difference of opinion as to the effect of unseaworthiness occurring subsequently to the inception of the voyage. It is universally conceded that a ship which is properly manned and equipped, and in all respects staunch and seaworthy at the time of leaving port, is thenceforth at the risk of the underwriters, who cannot rely on defects occasioned by subsequent causes, and which could not have been obviated by due care on the part of the insured. No argument is necessary to show—and the language of the policy itself implies—that a variety of dangers may be encountered during the voyage, against which no preparation can be a sufficient guard, and which may, at any moment, destroy the efficiency of the vessel, and leave her a mere wreck, at the mercy of the winds and waves. The object of the contract as one of indemnity, would fail if the insurers could make the injury inflicted by one peril a reason for refusing compensation for the consequences of another. A defence, on the ground of subsequent unseaworthiness, therefore, necessarily involves an inquiry into the conduct of those in charge of the vessel, and cannot be sustained without proof that they were guilty of a want of care, in the first instance, or failed to make proper exertions, subsequently.

Hence, the departure of a ship in an unseaworthy condition, from a port which she has entered in the course of the voyage, will not vitiate the policy, or discharge the insurers, unless the defect might have been discovered and remedied by proper effort on the part of the agents of the insured; *Peters v. The Phoenix Ins. Co.*, 3 S. & R. 25; *Capen v. The Washington Ins. Co.*, 12 Cushing, 517; *Paddock v. The New England Ins. Co.*, 11 Pick., 227, 236; nor will the insurance be defeated

by unseaworthiness due to the gnawing of rats, or the operation of other hidden causes after the policy has attached, unless the master of the vessel is guilty of negligence, in not ascertaining the source of the evil, and arresting its progress before it goes too far; *Garrigues v. Core*, 1 Binney, 592. The ship owner is, however, liable under these circumstances to the shipper, and, if so, subrogation may be claimed by the insurers. *Ray v. Wheeler*, 2 Law Reports, C. P. 302 (post).

The policy will not, therefore, be vacated by a failure to remedy a hidden defect occurring after the risk has commenced, and not discoverable with ordinary care. The question is one of negligence depending on the means at the disposal of the master, and whether there was enough to put him on his guard; and in *Starbuck v. The New England Ins. Co.*, 19 Pick. 198, the insurers were held answerable for the loss of a whale-ship, which sprung a leak and foundered while at sea, although the master knew that she had met with a violent shock about a year previously, caused, as was supposed, by a blow from a whale, and had sailed from port afterwards without heaving her down, or examining her bottom.

It is equally well settled that unseaworthiness arising subsequently to the commencement of the voyage is not a defence, unless it contributes directly to the loss; *Walsh v. Washington Ins. Co.*, 3 Robertson, 202; and that it will always be a sufficient answer to show that the defect was made good before the injury for which the plaintiff seeks to recover. *Paddock v. The New England Ins. Co.*, 11 Pick. 227, 234; *Copen v. The Washington Ins. Co.* Hence, an omission to replace an anchor or cable, which has been carried away while at sea, by procuring another at an intermediate port, will not exonerate the insurers from liability for the subsequent loss of the vessel in the open ocean where an anchor would have been useless, and the want of it, can have had no influence on the result. *The American Ins. Co. v. Ogden*, 15 Wend. 532; 20 Id. 287. For the same reason, the failure to take a pilot, on entering or leaving port, in the course of the voyage, will have no effect on the right to indemnity for a subsequent loss, which it has had no share in producing; *Keller v. The Firemen's Ins. Co.*, 3 Hill, 250; *McMillan v. The Union Ins. Co.*, 1 Rice, 248; while it has been repeatedly held, that a defence founded on an allegation, that the vessel was rendered crank and unseaworthy, by discharging the cargo without replacing it by ballast, may be overthrown, by proof that her trim was restored before the loss, notwithstanding the argument that the delay, which took place while the progress of the vessel was retarded by her inability to carry sail, may have brought her within the reach of the peril, by which she was finally destroyed. *Chase v. The Eagle Ins. Co.*, 5 Pick. 50; *DeBlois v. The Ocean Ins. Co.*, 15 Id. 304. And in *Hollingsworth v. Broderick*, 7 A. & E. 40, a plea that the ship became

unseaworthy during the continuance of the risk, and might have been repaired at a small expense, but was not, was held not to be a good defence to an action against the insurers; one reason being, that the unseaworthiness was not averred to have led to, or brought about the loss.

But the language held by the court, on this occasion, went beyond what was strictly necessary for the determination of the question raised by the pleadings, and disclosed the existence of a difference between the English courts and those of this country, which subsequent decisions have rendered still more apparent. The implied warranty of seaworthiness was said to be satisfied, if the vessel was seaworthy at the commencement of the risk, and much doubt was expressed, whether the insured should be held answerable for the unsoundness of her condition at a subsequent period of the voyage, which was treated as a new, and, perhaps, dangerous doctrine, that had not yet received the sanction of any authoritative decision, and formed no part of the recognized or established law of insurance. The point arose not long afterwards in *Dixon v. Sadler*, 5 M. & W. 405, under a plea, that the loss in the declaration mentioned, was occasioned by the negligence of the master and mariners, in throwing so much ballast overboard, as to render the vessel crank and unfit to carry sail. The counsel who argued the case for the insurers, were unable to produce a single authority, or anything more than some very general dicta, in support of the plea, which was held to be bad by the court, on the ground, that there is no express or implied warranty that the vessel shall continue to be seaworthy, or that the officers and crew shall make proper exertions to preserve that state of efficiency throughout the voyage, which is admitted to be indispensably necessary at its commencement. This decision was affirmed by the Exchequer Chamber (*Sadler v. Dixon*, 8 M. & W. 894), and is fully sustained by *Redman v. Wilson*, 14 Id. 476, where the insurers were held answerable, although the loss of the vessel was due to injuries inflicted on her hull, by the negligence of the persons who were engaged in putting the cargo on board, which rendered her too leaky to be kept afloat, and finally made it necessary to run her on shore. The court were of opinion that the case fell within the well established rule, that the underwriters cannot escape from liability for losses occasioned by the perils against which they have insured, by tracing them back to the misconduct or laches of the master or mariners, and that this is true, even where the vessel is disabled by the neglect. So in *Thompson v. Hopper*, 6 Ellis & Bl. 172, Lord Campbell said that "by the English law the insurers were not bound to keep the ship seaworthy throughout the voyage or during the continuance of the risk. Their responsibility was, consequently,



the same when she was lost, through unseaworthiness, arising from the negligence of the captain, as if she had burned from his negligence."

The authorities in this country are, however, express, that the responsibility of the insured for the seaworthiness of the vessel, continues while the risk endures, and precludes them from charging the insurers with any loss or injury, which is due to a want of care and diligence in keeping the vessel in a proper state for service. *Howard v. The Orient Ins. Co.*, 2 Robertson, 239. The point arose in *Paddock v. The Franklin Ins. Co.* 11 Pick. 227, where the court were clearly of opinion, that the insurers could not be made answerable for the loss of a vessel while at sea, by a leak occasioned by a defect in her hull, which might have been discovered and remedied by due effort while in port. The policy was on time, and the vessel admitted to have been seaworthy at the commencement of the voyage, so that the case is directly in conflict with that of *Sadler v. Dixon*, and illustrates the different aspect in which the question is viewed in this country and in England. The same rule was applied in *Stewart v. The M. and F. Ins. Co.*, 1 Humphreys, 242, to the insurance of a tow-boat, engaged in the navigation of the Mississippi; while in *Hazard v. The New England M. Fire Ins. Co.*, 1 Sumner, 218, the insurance was held to be vitiated by the failure of the master to replace the false keel, which had been detached by striking on a rock. The question was examined soon afterwards in *Copeland v. The New England Ins. Co.*, 2 Metcalf, 432, where the prior cases in Massachusetts were affirmed, and the decision of the Exchequer in *Sadler v. Dixon*, said to be in conflict with some of the best established principles of the law of insurance. And in *The Merchant's Ins. Co. v. Sweet*, 6 Wisconsin, 670, the court held that the plaintiff was not only bound to have the vessel seaworthy in the first instance, but to keep her in a navigable condition throughout the voyage, and could not recover for a loss arising from the neglect of the master in not ballasting the vessel before she sailed, at an intermediate port where she had discharged her cargo. Some doubt was, however, expressed in *Cudworth v. The South Carolina Ins. Co.*, 4 Richardson, 416, as to the true principle, and the case was finally decided on the ground, that the owner acted as master, and therefore could not charge the insurers with a loss occasioned by a neglect for which he was personally responsible. And in *The Marine Ins. Co. v. Butler*, 20 Md. 41, the court held in accordance with the English authorities, that subsequent unseaworthiness resulting from the acts or defaults of the master would not exonerate the insurers.

It would seem to be generally conceded that the insured is not entitled to compensation for an injury resulting from his own wrong; and a plea that the owner occasioned the loss by knowingly and wilfully sending the vessel to sea in an unseaworthy condition, will consequently

be a good defence; *Thompson v. Hooper*, 6 Ellis & Bl. 172, 937, 1 Ellis Bl. & Ellis, 1038; even when the policy is on time, and there is no implied warranty of seaworthiness.

It is, however, generally conceded that neglect not resulting in unseaworthiness, and consisting merely in a want of due care in the management of the vessel, is not a defence even when it conduces directly to the loss. The maxim *causa proxima non remota spectatur*, applies invariably as against the insurers, although it does not always hold good in their favor. A man who stipulates that an event shall not occur is answerable for every consequence which flows from it in the natural course of things, and it is not necessarily a sufficient answer to an action for the breach that the event itself was due to a cause not enumerated in the covenant. *Thompson v. Hooper*, 6 Ellis & Bl. 937, 947. Water is not within the terms of a policy against fire, but the insurers are confessedly responsible for the damage occasioned to the house or merchandise by the water used to extinguish the flames. So a recovery may be had for a loss by theft during the removal of the goods from a building which is on fire. In like manner when it becomes necessary to sell the cargo in consequence of the delay arising from an injury to the vessel, the law will look behind the perishable condition of the goods, to the storm or other peril by which the vessel was incapacitated from continuing the voyage. *Roux v. Salvador*, 3 Bing. N. C. 266; *Montoya v. The London Ass. Co.*, 6 Exchequer, 451.

On the other hand it is equally well settled, that when the loss is due to a cause for which the insurers are responsible, they cannot escape from liability on the ground that the danger arose from negligence, and might have been avoided with proper care. *Thompson v. Hooper*, 1 Ellis, Bl. & Ellis, 1038. The advance of the courts to this point, has been gradual, and the question remained open until a recent period. The law of France, as embodied in the Ordinance of Louis XIV., and the present commercial code of that country, exonerates the insurers from losses arising from the negligence or default of those who are intrusted with the care of the vessel; Valin, liv. 3, tit. 6, art. 27, 28; Emerigon, *Traité des Assurances*, chap. 12, sects. 2, 3; Pothier, *Contrats de Louage Maritime*, sect. 2, 213; Pardessus, *Cours de Droit Commercial*, tome 3, No. 771; unless the policy contains a stipulation against barratry, which, as there construed, comprehends neglect and oversight, as well as acts of misfeasance or fraud; Valin, liv. 3, tit. 6, art. 26; Emerigon, chap. 12, sect. 3; Pardessus, tome 3, Nos. 772, 773. Indeed, Emerigon was of opinion, that the insured could not divest himself of responsibility for the acts or defaults of his agents, or throw any portion of it on the insurers, and that the right to compensation, for injuries occasioned by negligence or misfeasance, was confined to shippers, and did not extend to the ship owner, who was responsible for

the selection or appointment of the officers and crew. Emerigon, ch. 12, sect. 3. In England and this country, barratry is limited to positive and wilful wrong, as distinguished from mere carelessness or non-feasance; and the opinion of the courts consequently seems at one time to have been, that negligence was a *casus omissus*, not enumerated or comprised in the policy, and which consequently must be borne by the insured, and not by the insurers. Thus in *Law v. Hollingsworth*, 7 Term, 160, the neglect of the pilot, in leaving the ship while ascending the river Thames, and of the captain, in suffering him to depart, was held a sufficient answer to an action on the policy; while in *Grim v. The Phoenix Ins. Co.*, 13 Johnson, 457, the insurers were held free from liability, for a loss occasioned by the negligence of one of the crew, who placed a candle so near the binnacle, as to set fire to the vessel; and Thompson, C. J., who delivered the opinion of the court, said, that the insurers were not liable for losses within the policy, when produced by means not comprehended in its terms, and foreign to the true meaning of its provisions. The same view was taken in *Cleveland v. The Union Insurance Company*, 8 Massachusetts, 308, where the court cited, and relied on the language held in *Grim v. The Phoenix Insurance Company*, as decisive against the right to hold the insurers for a loss resulting from the negligence of the agents of the insured; and is also sustained by the cases of *Lodowick v. The Ohio Insurance Company*, 5 Ohio, 433, and *Fulton v. The Lancaster Insurance Co.*, 7 Id. 406. But it is now well settled, both in England and this country, that a loss, occasioned by a peril within the policy, cannot be taken out of it, by proof that the peril itself arose, or had its origin in the neglect of the master or mariners, and might have been surmounted by proper effort on their part. Thus, in *Smith v. Scott*, 4 Taunton, 126, the insurers were held answerable for a collision, occasioned by gross carelessness and inattention; Mansfield, C. J., remarking, that the loss was not the less due to the force of the winds and waves, because the danger might have been avoided, by care in managing the vessel. The law was held in the same way, in *Busk v. The Royal Exchange Assurance Company*, 2 B. & Ald. 73, with reference to a fire caused by negligence; while in *Walker v. Maitland*, 5 Id. 171, the insured were allowed to recover for a loss occasioned by the gross negligence of the master and crew, who went to sleep while the vessel was under sail, and suffered her to drift on the rocks, without the control of the helm. And when the question arose in *Redman v. Wilson*, 14 M. & W. 476, judgment was given against the insurers, although the vessel was run on shore in consequence of a leak occasioned by the careless manner in which her cargo had been thrown into the hold.

It was held in like manner by the Supreme Court of the United States, in *The Patapsco Ins. Co. v. Coulter*, 3 Peters, 222, and *Waters*

v. *The Louisville F. Ins. Co.*, 11 Id. 213, that the loss should be referred, in every instance, to its proximate cause, without considering what lay behind, or whether the vessel had been brought within the reach of the peril by a want of due care and skill. These cases were followed in *The American Insurance Company v. Insley*, 7 Barr, 223; *The St. Louis Ins. Co. v. Glasgow*, 8 Missouri, 713; *Hale v. The Washington Ins. Co.*, 2 Story, 176; while in *Matthews v. The Ins. Co.*, 1 Kernan, 9, the New York Court of Appeals abandoned the ground taken in *Grim v. The Phoenix Ins. Co.*, as untenable, and concurred with the decision in *Waters v. The Louisville Ins. Co.* A recovery was in like manner had in *Perrin's Administrators v. The Princetown Ins. Co.*, 11 Ohio, 147, for the loss occasioned by the explosion of the boilers of a steamboat, while running under high pressure, and at an undue rate of speed; while the courts of Massachusetts are now disposed to carry the liability of the insurers for losses resulting from negligence further than the Supreme Court of the United States. *Copeland v. The New England Ins. Co.*, 3 Metcalf, 432; *Nelson v. The Suffolk Ins. Co.*, 8 Cushing, 477. And as the nature of the risk does not vary the principle, the negligence of the insured will not exonerate the insurers from responsibility from a loss by fire, unless it is of that gross character, which is equivalent in effect, if not in design, to fraud. *St. John v. The American Ins. Co.*, 1 Duer, 371; *Hynds v. The Schenectady Ins. Co.*, 16 Barbour, 119; *Gates v. The Madison County Ins. Co.*, 1 Selden, 478; *Huckins v. The People's M. F. Ins. Co.*, 11 Foster, 238; *Chandler v. The Worcester M. F. Ins. Co.*, 3 Cushing 238; *Johnson v. The Berkshire Ins. Co.*, 4 Allen 388; *The Citizens' Ins. Co. v. Marsh*, 5 Wright, 386.

But while the insurers cannot escape from liability under this course of decision, for an injury which falls within the terms and meaning of the contract, by showing that it had its origin in the negligence of those who were intrusted with the care of the vessel, it goes no part of the way towards freeing the insured from a compliance with the warranties or conditions of the policy, or from any obligation which he has expressly or impliedly agreed to fulfil. These still remain on their original footing, and their non-performance will avoid the insurance, even when it is due to the laches of the master or mariners, and could not have been prevented by the utmost diligence on the part of the owner of the vessel. *The Merchants' Ins. Co. v. Sweet*, 6 Wisconsin, 696. Thus, in *Wilcox v. The Union Ins. Co.*, 2 Binney, 574, Tilghman, C. J., was clearly of opinion, that a warranty of neutrality would be broken, and the insurers discharged, by the loss of the neutral character of the vessel during the voyage, through a rescue, or other belligerent act on the part of the crew, unless their misconduct was so gross or wilful, as to fall within the clause by which the defendants had

made themselves answerable for barratry. "The insured," said he, "has warranted that the property is neutral, and by construction of law, that it shall be so conducted as to remain neutral during the voyage." It is well established, in accordance with this decision, that the warranty of neutrality extends beyond the commencement of the voyage, and renders the insured answerable for the loss of the neutral character for which he has stipulated, by the negligence or misconduct of the officers and crew at any period during the continuance of the risk. 1 Arnould on Insurance, 611; 1 Phillips, 368. In like manner, a deviation from the proper course of the voyage will be equally effectual in discharging the insurers, whether it results from negligence and want of skill, or from design. *The Augusta Ins. Co. v. Abbott*, 12 Md. 348, 343; *Cattell v. Wiggin*, 13 Mass. 168. It is, therefore, obvious, that if the warranty of seaworthiness is a continuing one, it must, like other conditions, be fulfilled at the peril of the covenantor, and that he cannot excuse a breach by showing that it arose from negligence, or other controllable cause.

It is sometimes not a little difficult to know whether the negligence of the master or crew is a breach of the implied warrant of seaworthiness, or a mere personal default, which does not vary the condition of the vessel, or operate to discharge the insurers. The question arose in *Copeland v. The New England Insurance Company*, 2 Metcalf, 432, where the failure of the subordinate officers to remove the master—who had become insane during the course of the voyage—from the command of the vessel, was relied on by the insurers as a reason for refusing to make compensation for her loss, which happened in consequence of his incapacity to give proper orders. This view of the case was adopted by Wilde, J., who seems to have thought that, as the competency of the master is as essential to seaworthiness as the soundness of the hull, or of the masts and rigging, no valid distinction could be drawn between the failure to remove him from a post which he was no longer competent to fill, and an omission to replace a yard or mast which had been broken or sprung, by a sound one. But the majority of the court dissented from this conclusion, on the ground that the insanity, illness, or death of the officers, or crew of a vessel, after her departure from port, is one of those risks which must be borne by the insurers; and that, even if the subordinate officers had shown a want of proper decision and promptitude, in not taking the command into their own hands as soon as the necessity for their doing so was apparent, the case was still one of mere negligence in the management of the vessel, which had no effect in vitiating the insurance or discharging the insurers.

We have seen that losses, occasioned by a peril within the policy,

cannot be taken out of it, by tracing them back to the negligence of the agents of the insured, but it is not the less true, that negligence is not one of the risks assumed by the insurers, and that they are not responsible for injuries caused directly by laches or misconduct, unless the misfeasance is so gross or wilful, as to be actually barratrous. *Hazard v. The New England Marine Ins. Co.*, 1 Sumner, 218; *The General Marine Ins. Co. v. Sherwood*, 14 Howard, 351. Thus, in *The General Marine Ins. Co. v. Sherwood*, a decree founded on the negligence of the master and mariners, and charging the ship with the injury inflicted on another vessel by a collision at sea, was held to be due to a cause for which the insurers were not responsible, and which consequently remained at the risk of the insured. It was conceded that a decree apportioning the injury between both vessels, might be evidence of the damage, as judicially ascertained; *Peters v. The Warren Ins. Co.*, 3 Sumner, 389; 14 Peters, 99; *Hale v. The Washington Ins. Co.*, 2 Story, 176; but it was contended that a sentence throwing the whole loss on one showed conclusively that the collision was due to negligence, and therefore not within the terms of the policy. This decision, is opposed on the one hand, by the case of *Nelson v. The Suffolk Ins. Co.*, 8 Cushing, 477, where the insurers were held to be equally liable, whether the collision was, or was not, due to negligence, and sustained, on the other, by *Matthews v. The Howard Ins. Co.*, 13 Barbour, 234; 1 Kernan, 9; where the arguments on both sides were passed in review, and the preference given to the decision of the Supreme Court of the United States, as better founded in reason, and more consonant with the true interpretation of the contract of insurance. This conflict of authority may induce a doubt, whether the English cases, which limit the liability of the insurers for the results of a collision, to the loss actually sustained by the ship insured, and refuse to permit it to be carried further by a subsequent judgment or decree, awarding compensation for the injuries inflicted on the ship with which she comes in contact, are not better founded on principle, than the more artificial rule which prevails in the United States. *De Vaux v. Salvador*, 4 A. & E. 420.

The maxim *causa proxima non remota*, meets with an exception when the vessel is intentionally brought within the reach of the peril, by the wilful act of the master, and the insurers will not be answerable although the disaster is immediately caused by the winds and waves, unless barratry is enumerated in the policy. *Phillips v. Nairne*, 4 C. B. 343. A recovery could not therefore as it seems be had, under a declaration alleging a loss by the perils of the sea, if it appeared from the evidence given at the trial, that the vessel went down in consequence of a leak, occasioned by boring a hole through her bottom with an auger, or knocking a plank out with an axe. When, however, the

cargo was thrown into the hold with so much violence as to start the planks, and it became necessary in order to prevent her from foundering where she lay, to run the vessel on shore, the court held that the loss was properly described, as one of the perils of the sea. *Redman v. Wilson*, 14 M. & W. 476.

The question, when unseaworthiness is subsequent in its nature, and when it should be referred to the commencement of the risk, is obviously one of no small importance (ante, 774), and would seem to depend, not so much on when the vessel becomes unseaworthy, as on, whether the deficiency in her condition or equipment, is due to an original want of strength or preparation, or to events occurring after the risk began, and which would have produced the same result had she been in all respects sound, and able to encounter the perils to which she was exposed. Thus, although a steamer insured at and from New York to Halifax, and thence to her destination in England, would not be guilty of a breach of the warranty of seaworthiness, by leaving New York without a sufficient quantity of coal for the whole voyage, unless she failed to supply the deficiency at Halifax; yet, her subsequent departure from Halifax would no doubt, invalidate the policy, by violating a condition which remains unfulfilled until everything has been furnished which is essentially necessary to the safety of the vessel. In like manner, a canal-boat insured along the line of a canal, and thence down a wide or rapid river, or across an arm of the sea, might be covered by the policy while traversing the canal, and yet forfeit its protection, by entering upon the rest of the passage with inadequate means, although the crew did all in their power to supply the deficiency and were in no sense responsible for the ill success of their efforts. The warranty is not that the vessel shall be fit for all the successive stages of the voyage when the risk begins, but that she shall be prepared for each of them, when the occasion comes. *Howe v. The New England Ins. Co.*, 6 Gray, 192; *Thompson v. Hopper*, 6 Ellis, & Bl., 167, 182. On the other hand, it has been held, that, where there is no deficiency in point of construction or equipment, the insured will not be answerable for the intervention or operation of subsequent causes, unless they are guilty of some omission or default either personally or through their agents. Thus, in *Garrigues v. Coxe*, 1 Binney, 592, the departure of the vessel in an unseaworthy condition, from Cape St. Francois, was held not to free the insurers from liability under a policy at and from that place to Philadelphia, because the unseaworthiness was due to events which occurred while she was lying in harbor, and were consequently posterior to the commencement of the risk.

It seems to have been taken for granted until recently both in the United States and England, that the warranty of seaworthiness applies to time policies in a modified form, and as far as the peculiar nature of

the contract will allow. *The American Ins. Co. v. Ogden*, 15 Wend. 532; 20 Id. 287; *Hollingsworth v. Broderick*, 7 A. & E. 40, *Dixon v. Sadler*, 5 M. & W. 404. In *Thompson v. Hopper*, 6 Ellis, & Bl. 171, 179, Erle, J., observed that it did not appear that this had been doubted by any one prior to the decision of the Lords in *Small v. Gibson*, 16 Q. B. 128, 141; 4 House of Lord's Cases, 353. In that case the judgment of the Queen's Bench, which had been unqualifiedly in favor of the warranty, was reversed by the Exchequer Chamber. In delivering the opinion of the latter court, Parke, Baron, said, that the effect of the rule contended for by the insurers, would be to make the owners answerable for the condition of a vessel which might be at sea when the risk commenced, and forfeit the policy if she was defective in any particular, although from causes operating after she set sail and under circumstances rendering it impracticable to make repairs. But he was at the same time inclined to think, that the owners should be held to the same responsibility for the seaworthiness of the vessel at the time of leaving port, as if the insurance was for a specific voyage. When however the case was brought on error before the House of Lords, a majority of the judges were of opinion that although it is reasonable to require, that a vessel which is insured at and from a port shall be staunch, tight and well equipped when the risk begins, such an obligation cannot justly be implied in the case of a time policy, which may be effected while the ship is at sea, or so situated in other respects that she cannot be repaired. The argument was enforced by asking whether the insurance should be held invalid, if the ship was dismasted and drifting before a storm when the policy attached, contrary to the manifest design of the parties which is to afford an indemnity against all injuries occasioned by the perils of the sea. If seaworthiness was a condition precedent under these circumstances, the insurance would fail, and leave the insured without indemnity for a loss occurring without his fault, and directly within the legitimate scope of the contract. Two of the judges however dissented from this conclusion; and there were others who while concurring in the result, based their judgment on the narrower ground that for all that appeared on the record, the vessel might have been at sea when the risk commenced and disabled by antecedent injuries, which it was impossible either to prevent or remedy. Lord St. Leonard said, that when a time policy is effected on a ship in port, there is as much reason why she should be made seaworthy before setting sail, as if the insurance was for a specific voyage. A similar view was taken by Baron Platt.

The point actually determined in *Small v. Gibson*, is that unseaworthiness, at the commencement of the risk, is not necessarily a defence when the policy is on time. *Jones v. The Insurance Co.*, 2 Wallace, Jr., 278. Such an allegation obviously does not exclude the



inference that the ship was sound and well equipped when she sailed, and became unseaworthy subsequently, through the perils of the navigation. But the dicta of the judges went, as we have seen, much further, and to the extent of exonerating the insured from all responsibility for the condition of the vessel. And when the question arose not long after in *Thompson v. Hopper*, 6 Ellis & Bl. 171, 946; Ellis, Bl. & Ellis, 1038; a majority of the court were of opinion that the policy must receive the same interpretation whether the ship is at sea when the risk begins, or in a port where she might be repaired. If, said Lord Campbell, "time-policies do not in this respect come in the same category as voyage policies, I must respectfully doubt the power of courts of justice, to add by implication, a new condition to the contract, occasionally and according to circumstances." It was accordingly held that there is no implied warranty of seaworthiness in a time-policy, even when the ship is lying in a home port at the inception of the risk, and about to sail on a foreign voyage. But it was at the same time said to be an implied obligation, incident to every voyage, that the vessel shall, so far as the knowledge of the owner extends, be fit for service at the time of departure, and that no recovery can be had for a loss occasioned by a wilful disregard or violation of this duty. A plea that the plaintiff wilfully, knowingly and wrongfully sent the ship to sea at a time when it was dangerous to go to sea in the state in which she then was, and knowingly and wrongfully permitted her to remain at sea for a length of time, during which time she was wrecked by reason of the premises, was accordingly held good as showing that the injury was due to the personal misconduct of the insured, although it would not have been sufficient to aver that the vessel sailed in an unseaworthy condition, without alleging the knowledge or participation of the owner.

The case having been put at issue, and tried subsequently before Bramwell, B., who instructed the jury that the plaintiffs were entitled to a verdict, unless the unseaworthiness was the proximate cause of the loss, a new trial was granted by the Queen's Bench for misdirection, but their decision was reversed by the Exchequer Chamber. Ellis, Bl. & Ellis, 1037. A majority of the judges of that court agreed with Bramwell, that, as the vessel went ashore during a gale, through the breaking of the cable, it was immaterial that she had been detained in a dangerous position in consequence of the defective condition of her sails and rigging, which rendered her unfit to go to sea.

Crompton, J., dissented from the judgment; and Cochran, C. J., and Martin, B., only concurred in it, because the plea alleged the loss to have been produced by the unseaworthiness, as the direct and moving cause. The question whether the wrongful acts of the plaintiffs in sending the ship to sea, occasioned the state of things out of which the

loss arose, was consequently in their opinion not at issue, and could not properly be left to the jury.

The doctrine of *Small v. Gibson*, was applied in *Michael v. Tredwin*, 17, C. B. 551, to a policy in a peculiar form, "at and from the meridian of the day of sailing from Suez, to the meridian of the 20th of March;" while in *Jenkins v. Haycock*, 8 Moore, P. C. 351, the judicial committee of the Privy Council, held, that an insurance on time does not imply a warranty that a vessel shall be sound and seaworthy, either at the commencement of the risk, or when leaving an intermediate port.

But while such is the course of decision in England, the result in this country has been in some respects different, and although there is no absolute or unqualified warranty of seaworthiness in a time-policy; *Hathaway v. The Sun M. Ins. Co.*, 8 Bosworth, 33; the insured cannot recover if the vessel is at the commencement of the risk in a port where she might be rendered fit for sea, and sails subsequently in an unseaworthy condition, nor if, as it would seem, if she becomes unseaworthy during the course of the voyage from a cause that might have been prevented, and is lost in consequence of the defect. *American Ins. Co. v. Ogden*; *Rouse v. The Insurance Co.*, 25 Law Rep. 523; *Hoxie v. Pacific Ins. Co.*, 7 Allen, 211; *Hathaway v. The Sun M. Ins. Co.* In *Paddock v. The Insurance Co.*, 11 Pick. 227, the policy was on cargo on board the ship *Tarquin*, now on a whaling voyage on the Pacific Ocean, during her stay and until her return to Nantucket.

If this had been all, the insurance would have been of an intermediate nature between a time-policy and a policy for a specific voyage; one of the termini being the day on which the risk commenced, the other the arrival of the vessel. But inasmuch as the policy was expressed to be lost or not lost, and indicated an intention to assume a retrospective as well as a prospective risk, the insurance was held to cover the whole voyage. Shaw, Ch. J., in delivering the opinion of the court, remarked that it might be questionable, whether the warranty of seaworthiness should be held to result by legal implication, from a policy intended to attach on a particular day during the course of a voyage when both parties must be aware that the ship may have been injured or her efficiency impaired, by the force of the elements, or the deterioration incident to long and protracted service. But while this was said, and a dictum cited of Lord Mansfield, in *March v. Pigot*, 5 Burrow, 2804, that the insured ought to know the condition of the vessel when she leaves port, but has no means of knowing what it is after she has been out a twelvemonth; the whole was wound up, by a declaration that the seaworthiness of the vessel at the commencement of the risk should probably be deemed a necessary incident to the contract in this as in all other cases. This case was anterior to *Gibson v. Small*; and in *Jones v. Ins. Co.*, 2 Wallace, Jr., 278, the de-

cision of the House of Lords was said to establish that time-policies are not subject to an implied condition that the vessel shall be seaworthy at the commencement of the risk irrespective of circumstances, or the perils to which she may have been exposed. But Grier, J. intimated in delivering judgment that no recovery could be had if the ship was unseaworthy at the time of leaving home, or became so subsequently through the default of the insured or his duly authorized agents.

This view is obviously preferable to the position taken by the English courts, that the insured may stipulate for an indemnity against the consequences of his own negligence in exposing property and, what is more to be considered, life, to the perils of the sea, without making the preparation which humanity and prudence alike require. It is hardly a sufficient answer that the insurers may exact an express warranty of seaworthiness, because the subject is one which concerns the community at large, who may reasonably ask that the policy shall not receive an interpretation calculated to augment the dangers incident to the transportation of merchandise and passengers. If, as Baron Parke observed in *Small v. Gibson*, the doctrine of seaworthiness is designed to correct the tendency of the contract of insurance to render men careless of averting dangers by which they will not lose, the check is equally needed whether the risk is for a given time or from port to port. *Rouse v. The Ins. Co.*, 25 Law Reporter, 523.

Every rule is, however, subject to qualification, and this should not be carried to an extent that would deprive the insured of indemnity where it is justly due. Whether a warranty of seaworthiness should be deduced by implication depends primarily on the intention of the parties as gathered from all the circumstances. If their meaning can be ascertained it should govern, if not forbidden by sound policy. When the insurance is by the terms of the contract to attach to a vessel which may, so far as the knowledge of the parties goes, be at sea, or in a situation not admitting of repairs, it is fair to presume that the insurers are to take the risk of all defects that have arisen from external causes without neglect on the part of the insured. *Jones v. The Ins. Co.*, 2 Wallace, Jr., 280, 281. Whether the policy is on time, or for the voyage, seems to be material only as bearing on this cardinal point. If, for instance, a vessel which had left New York for China were to be insured subsequently to her departure from wherever she might then be until she reached her destination, it would scarcely be contended that the contract should fail because her masts had been carried away on the previous day during a gale. Such a case would be open to all the arguments against the warranty of seaworthiness which apply when the risk is to endure for a given time. *Macey v. The Mutual Ins. Co.*, 12 Gray, 497. "In a policy on a voyage," said Bigelow, C. J.,

in *Hoxie v. The Washington Ins. Co.*, 7 Allen, 211, 222, "effected after a ship has sailed, and to commence on a designated day subsequent to her departure, the warranty of seaworthiness is satisfied if she was seaworthy when she departed from port to enter upon the voyage." On the other hand, it has been held, and would seem to be plain on principle, that there is as much reason for implying a warranty of seaworthiness in a time-policy on a vessel described as then lying in port, as if she were insured for a specific voyage. *Rouse v. Ins Co.*, 25 Law Reporter, 523.

All that can reasonably be asked either on a time or voyage policy is that the ship should be reasonably fit for sea when she sails, and that due care should be taken to maintain her in that condition throughout the continuance of the risk. *The Amer. Ins. Co. v. Ogden*, 15 Wend. 532; 20 Id. 287; *Capen v. The Ins. Co.*, 12 Cushing, 51. The former condition is absolute, and vitiates the policy if not fulfilled, although from causes beyond the control of the insured, the latter is relative and will not operate as a defence, unless the breach occurs through negligence and contributes to the loss. Accordingly, when the question arose in *Jones v. The Ins. Co.*, 2 Wallace, Jr., 278, it was held in conformity with the judgment of the Exchequer Chamber in *Small v. Gibson*, that time-policies are not subject to an implied condition that the vessel shall be seaworthy at the commencement of the risk, irrespective of circumstances or the perils to which she may have been exposed. It is true, said Grier, J., that *Small v. Gibson* does not decide that there is no warranty of seaworthiness in a time-policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage; or if she be at sea, that she was not seaworthy when the voyage commenced. It may be, also, that there is in a time-policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach. But in all such cases the plea must state such facts and circumstances as shall show either that at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss, or that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might and ought to have been repaired, the owner or his agents neglected to make such repairs, and the vessel was lost by a cause, which may be attributed to the insufficiency of the ship.

It was held in like manner, in *Capen v. The Washington Ins. Co.*, 12 Cushing, 51, that there is no implied warranty or condition in such an insurance that the vessel shall be seaworthy when the risk begins, because

the effect would be to avoid the policy even when the deficiency arose from causes beyond the control of the insured and had no share in producing the loss. It was said that when the vessel is insured during the course of a distant voyage, and may, consequently, be at sea or in a harbor where she cannot be repaired, the insured cannot be supposed to warrant her condition or intend that the insurance shall fail, if she has been rendered unserviceable by causes which no diligence could avoid. But the court were also of opinion that every ship should, for obvious reasons, not only be seaworthy when she sails, but kept, as far as circumstances will permit, tight, staunch, and well equipped throughout the voyage; although it seems to have been thought that a breach of this obligation would not invalidate the contract, unless it conduced to the loss.

If the ship is at sea when the risk begins, or in a distant port where there are no means of making the requisite repairs, it can obviously make no difference whether the limits of the risk are defined in space or time. *Hoxie v. The Pacific Ins. Co.*, 7 Allen, 211, 222. In *Macy v. The Marine Ins. Co.*, 12 Gray, 497, the insurance was to take effect on the 1st day of December, 1855, at noon, and to continue wherever the vessel might go on a whaling voyage until the said vessel should return and anchor in the port of departure, if she should so return before July 13th, 1856. It appeared in evidence that the ship had been seaworthy at the time of leaving port, but was at sea at the commencement of the risk in a disabled condition occasioned by the perils of the navigation, and the insurers were held answerable under the rule laid down in *Capen v. The Washington Ins. Co.*

These cases obviously are not in point where the ship is so situated at the commencement of the risk that full repairs might be made, and she subsequently sails in an unseaworthy condition. In *Hoxie v. The Pacific Ins. Co.*, 7 Allen, 211, the vessel sailed originally from the United States; but was subsequently damaged by stress of weather and compelled to put into the Bermudas to refit. It appeared, from the evidence given at the trial, that the port where she took refuge contained all the means and appliances requisite for repairing vessels and fitting them in all respects for sea. While the ship was in port and undergoing repairs, she was insured by a time-policy, the risk to commence on the 12th of September and endure for a year. She subsequently sailed in the prosecution of the voyage, and was lost in consequence of a leak which escaped observation until it was too late. Metcalf, J., before whom the cause was tried, told the jury that as the ship was seaworthy when she left the United States, the right of the insured to a verdict depended on whether the leak could have been discovered and stopped by due care on the part of the master. But a new trial was ordered by the court in banc, on the ground that, as the

vessel was at the time of effecting the insurance in a port where full repairs might have been made, the implied warranty was as absolute in all respects as if the insurance had been for a voyage. And in *Hoxie v. The Home Ins. Co.*, 32 Conn. 21, the court held, on the authority of this case, that when the vessel is at the inception of the risk in a place where full repairs might be made, seaworthiness is a condition precedent, without which no recovery can be had against the insurers. The question whether unseaworthiness occurring after the commencement of the voyage, but before the insurance is effected will avoid a time-policy, did not arise in this instance, because the vessel was in a home port when the risk commenced, but the opinion of the court seems to have coincided on this point with that expressed in *Hoxie v. The Pacific Ins. Co.* A similar decision was pronounced by the Circuit Court of the United States, in *Rouse v. The Ins. Co.*, 25 L. R. 523, Grier, J., saying that when the risk begins to run on a given day wherever the ship may be, her unseaworthiness is clearly one of the risks assumed by the insurers, but that a different rule prevails when the ship is in port, when the policy attaches, and may, if she has no inherent defect, be rendered fit for sea.

In this instance the vessel was described in the policy as then lying in the port of Baltimore, which repelled the presumption that the insurance was effected without regard to place or the possibility of repairing antecedent injuries. And as the objection of Lord Campbell to varying a written contract by extrinsic evidence was obviated by the terms of the contract itself, the case can hardly be said to conflict with *Gibson v. Small*, and would probably have been decided in the same manner in England. And in *Hathaway v. The Sun M. Ins. Co.* the court held that if the ship is fit for service at the outset of the voyage, her departure from an intermediate port, where she might have been repaired, will not vitiate an insurance effected subsequently for a given time while she is at sea, unless the defect is due to the negligence of the master, and contributes to the loss.

The result of the decisions in the United States would seem to be that when the contract is for a given time and without reference to the situation of the vessel, the insurer takes the risk of past events in the same manner, though not to the same extent as if the insurance was expressed "lost" or "not lost" (post). In either case, unseaworthiness at the commencement of the risk is not necessarily nor even *prima facie* a defence, because it will, in the absence of proof, be ascribed to causes for which the insurer is liable, and that could not be controlled by the insured. *Capen v. The Washington Ins. Co.* Or, to state the argument somewhat differently, as the unseaworthy condition of the vessel may have been caused by a peril of the sea, the burden is on the insurer, to show that it was not, or that it might have been remedied

by the insured. When, however, it is made to appear that the unseaworthiness is due to an original and inherent defect, the insurance will fail, whether the policy is on time, or from place to place. And the result will be the same when the loss is occasioned by a defect arising after the inception of the voyage, but which might have been repaired before the policy attached. *Hoxie v. The Pacific Ins. Co.* Under these circumstances the evidence, does not, as Lord Campbell seems to have supposed, alter the terms of the policy, and merely shows that the condition which the law implies has not been fulfilled. The warranty grows out of the nature of the contract, but the obligation which it imposes varies with circumstances and the situation of the vessel.

In *Hoxie v. The Pacific Ins. Co.* (ante), the unseaworthiness was prior to the inception of the risk, although subsequent to the commencement of the voyage. It is not, therefore, in point when the vessel is stanch, tight, and properly rigged and manned when the policy attaches, and becomes unseaworthy afterwards through the operation of causes which could not be obviated by due diligence on the part of those on board. Such a case should seemingly be governed by the rule which prevails in voyage policies, that subsequent unseaworthiness is not a defence unless the master is guilty of negligence in not repairing the defect, and it contributes to the loss. The opposite view is open to the objection of holding the insured to a more rigid accountability when the insurance is for a given time, than when it is from place to place. All that the insured can reasonably be supposed to warrant in effecting a time-policy, is that the ship was seaworthy when she sailed from home; that subsequent injuries have been repaired as thoroughly as circumstances and opportunity would allow; and that due care shall be taken to keep her fit for sea while the risk endures. The law was so held in *Hathaway v. The Sun M. Ins. Co.*, 8 Bosworth, 33; and a similar view was taken in *Capen v. The Washington Ins. Co.*, although the question was not directly before the court.

Agreeably to the English authorities, the warranty of seaworthiness derives its force from the implied agreement of the parties, as distinguished from the rules or policy of the law, and may, therefore, like other conditions of the same nature, be waived by those in whose favor it is introduced. The question arose in *Parfitt v. Thompson*, 13 M. & W. 392, where a stipulation in the policy, that the ship should "be deemed, and that she was thereby allowed to be seaworthy in her hull, tackle, and outfit," was held to preclude the insurers from contradicting it subsequently, or relying on the unsoundness of the vessel as a defence. The same point was decided in *Phillips v. Nairne*, 4 C. B. 343, where the court said that *Parfitt v. Thompson* was conclusive, that if a man chose to dispense with the warranty of seaworthiness,

and take the risk of insuring an unsound vessel, he must take the consequences.

It has yet to be seen whether the courts of this country will assent to this innovation on a doctrine which may be thought essential to correct the tendency of the contract of insurance to make men careless of their own property, and the lives and goods of others. The power to cover a worn out or rotten vessel with a policy, and then send her to sea, is a dangerous one, which should be withheld in view of the consequences that may flow from its abuse, and the increase which is said to have occurred in the number of shipwrecks on the English coast may to some extent be due to the relaxation of the salutary restraint of the earlier commercial law.

The seaworthiness of the vessel at the inception of the risk, or at any other period, is a question of fact for the jury, on which their decision will be final, unless contrary to the weight of the evidence, or in contravention of some legal rule or principle; *Field v. The Insurance Company of North America*, 3 Maryland, 244; although when the facts are ascertained, it may be the duty of the court to decide the point as one of law. *Welch v. The Washington Ins. Co.*, 32 New York, 427; *Sherwood v. Ruggles*, 2 Sandford, 55; *Wright v. The Orient Mut. Ins. Co.*, 6 Bosworth, 269, 277; *Rosenheim v. The Am. Ins. Co.*, 3 Missouri, 237. Whether the aid of a pilot was necessary to take the ship in or out of port, is, for instance, when not regulated by statute, a question of fact belonging to the appropriate tribunal for the determination of the weight and credibility of evidence; and the rule is the same when the insufficiency of the hull or rigging is alleged as a reason why the contract should be void. In the absence of proof as to the actual condition of the vessel, the jury may, and should presume her seaworthy, for the law inclines in this, as in many other instances, to the belief that everything has been done which duty requires; *Williams v. The East India Co.*, 3 East, 192; *Brass v. Mailland*, 6 Ellis & Bl. 470, 484; and will refuse to believe that a ship was sent to sea in a state to endanger the lives of those on board, unless there is something to turn the scales and induce an opposite conclusion. *Field v. The Insurance Company of North America*, 1 Arnould, 652; *Parker v. Potts*, 3 Dow, 23 (ante, 514). And this would seem to be the better view of the law, although a different view was taken in *Tidmarsh v. The Washington Ins. Co.*, 4 Mason, 439, 446, and *Moses v. The Sun M. F. Ins. Co.*, 1 Duer, 151, and the burden of proof said to be on the plaintiff, as in other cases, where compliance with a condition precedent is essentially requisite. When, however, a vessel is shown to have been unsound or leaky, or to have wanted any indispensable requisite for the voyage immediately after sailing, the presumption is strong, if not irresistible, that the deficiency existed at the time of



leaving port; *Parker v. Potts*, 3 Dow, 323; *Paddock v. The Ins. Co.*, 11 Pick. 227; *Welch v. The Washington M. Ins. Co.*, 32 New York, 427; 3 Robertson, 202; and the better opinion would seem to be, that the inference thus drawn is one of law (ante, 766); *Watson v. Clark*, 1 Dow, 336; and cannot be rebutted or overthrown by proof that she was in all respects sound before setting sail. Thus, the principal case decides, that when a vessel proves so leaky, immediately on leaving port, or soon after putting to sea, as to show that she is unsound or unfit to encounter the perils of the voyage, without having encountered a heavy storm or any other peril of a like nature, the law will deem her unseaworthy and deny all compensation to the insured. This decision is sustained by the language held in *Fleming v. The Marine Ins. Co.*, 3 W. & S., 144, 153; and also by the recent case of *Myers v. The Girard Ins. Co.*, 2 Casey, 192, where the unseaworthiness consisted in the inadequacy of the furnaces and boilers of a steamboat, to produce sufficient steam for the propulsion of the vessel, which became apparent shortly after leaving the wharf, and compelled an immediate return to port. The presumption is the same when a vessel insured at and from a port, springs a leak and goes down while lying at anchor, without any assignable cause. *Parker v. The Union Ins. Co.*, 15 Louisiana, Ann. 688.

It is, however, plain that no inference against the fitness of a ship to go to sea can be drawn from her unseaworthiness during the voyage, unless the nature of the defect, or the circumstances under which it occurs, negative or exclude the idea that it was due to one of the many perils to which a vessel may be exposed while traversing the ocean, or even during the course of a sheltered inland navigation; *Walsh v. The Marine Ins. Co.*, 32, New York, 427; and it has been held in some instances that the presumption arising from the occurrence of a leak immediately after leaving port may be repelled by calling competent witnesses to prove that the vessel was tight and staunch when she sailed. *Marcy v. The Sun Ins. Co.*, 11 Louisiana, Ann. 749; 14 Id. 264; *Parker v. The Union Ins. Co.* The question arose, and was elaborately examined in *Patrick v. Hallett*, 3 Johnson's Cases, 76; 1 Johns. 241; where the court set aside a verdict against the insurers, on the ground that a ship which springs a leak and founders at sea, without meeting with heavy weather or any other peril must be presumed to have been unseaworthy at the commencement of the voyage. At a subsequent trial witnesses were called to show that the vessel was new, and built in the most substantial manner; that she had been overhauled and repaired while in port, and that she was, so far as the closest examination could discern, thoroughly sound and seaworthy when the disaster occurred.

A demurrer having been taken to the evidence, it was contended for

the defence that the presumption that things remain the same when there is no adequate cause of change, could not be overcome by evidence that their condition was not what the event disclosed. If the vessel was unsound when she sunk, and there was no other way of accounting for the leak, she must have been unsound at the time of sailing. The presumption was one of law, as well as fact, and bound the court as it should have bound the jury. This argument failed to convince the majority of the judges who held that the case depended on presumptions, not of law, but of fact arising from conflicting statements, and must, therefore, agreeably to the well established rule, be decided adversely to the party who had demurred. The weight of the decision was, however, somewhat lessened, by the dissent of Chief Justice Kent, who was clearly of opinion that when the circumstances under which a leak occurs are such that it cannot be due to any other cause than the unsoundness of the vessel at the time of leaving port, the inference of unseaworthiness is drawn by the law and equally binding on the court and jury. In the subsequent case of *Talcot v. The Commercial Ins. Co.*, 2 Johnson, 124, 467, a vessel, which sprung a leak immediately after going to sea, in fair weather, and with but little sea, was proved, at the trial, to have been examined and repaired shortly before sailing, and to have been in every respect staunch, sound, and seaworthy, at the time of leaving the harbor, thus giving rise to the same conflict between the legal inference and the testimony of the witnesses, which occurred in *Patrick v. Hallett*. The question having been submitted to the jury, and decided by them against the insurers, a new trial was ordered, on the ground that the testimony brought to establish the soundness of the vessel was outweighed by the presumption arising from the circumstance of the loss. When, however, the case was again heard, on a motion to set aside a second verdict on evidence, which was substantially the same as that given at the former trial, the court refused to interfere; thus clearly indicating that they viewed the question as one belonging to the jury, and which must ultimately be governed by their decision. It has been held in like manner in South Carolina, that, while a new trial should be granted where the jury disregard the presumption which arises when a vessel founders shortly after leaving port, without any other assignable cause than her unfitness for the voyage; *Hudson v. Williamson*, 1 Constitutional Court R. 360; they are still the proper persons to determine whether she was seaworthy at the time of sailing, subject to the power of the court to set aside the verdict when plainly contrary to the weight of evidence. *Mullin v. The South Carolina Ins. Co.*, 2 McCord, 334; *The Union Ins. Co. v. Caldwell*, 1 Dudley, 263. See *Marcy v. The Sun Ins. Co.*, 11 Louisiana, Ann. 749; 14 Id. 264; *Parker v. The Union Ins. Co.*, 15 Id. 688.

The better opinion would, notwithstanding, seem to be as Lord Eldon held in *Watson v. Clark*, 1 Dow, 336, that when the inability of the ship to perform the voyage becomes evident soon after leaving port, the presumption is that she was unseaworthy when the voyage began, and the *onus probandi* will be on the insured to show that the inability arose from a cause subsequent to the commencement of the risk. *Watson v. Clark*, 1 Dow, 336. And this cause must, as it would seem, consist in a gale of wind, a heavy sea, or some peril of a like nature, transcending the risks to which every vessel is necessarily subject as soon as she leaves harbor and encounters the swell of the open sea. *Myers v. The Girard Ins. Co.*, 2 Casey, 192; *Wright v. The Orient M. Ins. Co.*, 6 Bosworth, 269. See *Stephenson v. The Ins. Co.*, 54 Maine, 55.

A ship which, from an inherent defect or weakness, cannot traverse the ocean with safety in calm weather and when no extraordinary cause supervenes, is obviously not fit for sea, and cannot properly be made the subject of the contract of insurance. And as such a state of things is not so much evidence of unseaworthiness as unseaworthiness itself, a nonsuit may be entered when it sufficiently appears from the plaintiff's case; *Myers v. The Girard Ins. Co.*; or the jury told to find a verdict for the defendants. And experience shows that it is better to adopt this method than trust the cause to the erring sympathy of the jurors, who are apt to lose sight of general principles in the desire to give the losing party the benefit of the indemnity for which he has stipulated. Accordingly, the jury were instructed in the principal case, that if the ship began to leak as soon as she began to sail, or soon after, and continued to leak up to the occurrence of the storm in which she perished, the law deemed her unseaworthy, and the defendants were entitled to a verdict. This course is, as the cases cited above from Johnson's Reports indicate, the only one that can prevent an unseemly conflict between the court and jury, in which the former may be worsted by successive verdicts rendered contrary to the right reason which is the life of the law.

The result of the cases as a whole, accordingly, seems to be that when a vessel founders without any adequate cause soon after leaving port, the presumption is that she was unseaworthy when she sailed, and it will be for the court to say whether there is any sufficient evidence to rebut this presumption, or show that the loss was occasioned by the perils of the sea as distinguished from the inherent weakness and insufficiency of the thing insured. *Wright v. The Orient Ins. Co.*, 6 Bosworth, 269; *Hathaway v. The Sun M. F. Ins. Co.*, 8 Id. 33, 54. It has been repeatedly held, and is well settled, that if the masts and spars of the ship are damaged, or her sails torn or carried away, or even if she springs a leak while at sea, unless the loss can be traced to the immediate and efficient operation of a peril of the sea, it will be consid-

ered as resulting from the ordinary wear and tear of the voyage, and the expense of repairing it will not devolve upon the underwriters. (Emerigon, 390; Pothier, n. 66; 3 Kent's Comm. 300; 1 Phillips, 625-6; 2 Arnould, 746-7; Benecke on Indemnity (Eng. ed.), 454, 5, 6.) And the rule should obviously be the same when the vessel is wholly lost, as when the injury is merely partial. When, however, any sufficient evidence is adduced that the vessel was subjected after the commencement of the voyage to the operation of a cause within the policy and adequate to account for the loss, the question should be submitted as one of fact to the jury, and their decision regarded as final, unless clearly against the weight of evidence, or for some other reason proper to be set aside. *Stephenson v. The Ins. Co.*, 54 Maine, 55.

The right to require that the ship shall be reasonably fit for the service in which she is engaged, is not confined to the insurers, but belongs also to the shipper, and hence the ship owner will be responsible for any loss that the cargo may sustain in consequence of the unseaworthiness of the vessel, even when the proximate cause of the injury is a peril of the sea, and within the exception in the bill of lading. *Lyons v. Mills*, 5 East, 428, 437; *Redhead v. The Midland Railroad Co.*, 2 L. R. Q. B. 412; see 1 Smith's Lead'g Cases, 329, 6 Am. ed. And in *Redhead v. The Midland R. R. Co.*, Blackburn, J., said that although the point had not apparently been decided, there was every reason why a similar warranty should exist in favor of a passenger in a railway car or stage coach. Whether railway companies and other carriers of passengers by land warrant the fitness of their carriages, or are only responsible for defects that might have been guarded against by due care, is, however, a disputed question, which was decided in favor of the defendants in *Ingalls v. Bills*, 9 Metcalf, 1; *Mier v. The Penna. Railroad Co.*, 14 P. F. Smith, 225; and *Redhead v. The Midland Railway Co.*; and against them in *Alden v. The N. Y. Central R. R. Co.*, 26 New York, 102; although it seems to be conceded in England that the carrier will be responsible if the defect could have been obviated during the manufacture or construction of the carriage, or discovered and remedied afterwards by the exercise of due care. *Sharp v. Gray*, 9 Bing. 457.

In *Hegeman v. The Western R. R. Co.*, 3 Kernan, 9, the court held that to exonerate the defendants, it must not only appear that the flaw which caused the accident could not have been discovered by an attentive examination, or the use of any known method; but that they bought the axle from a person possessing the requisite skill, and who had exercised it during the process of manufacture; while in *Allen v. The N. Y. Central* these limits were transcended, and a common carrier said to be absolutely bound to furnish a roadworthy vehicle and responsible if he did not, even when the defect could not have been ascertained or remedied by the utmost care on his part, or that of the manufacturer from whom he bought.

## INSURABLE INTEREST.

MICHAEL LAZARUS *v.* COMMONWEALTH INSURANCE COMPANY.

In the Supreme Court of Massachusetts.

MARCH TERM, 1827.

[REPORTED, 5 PICKERING, 76-82.]

*Any interest in the plaintiff which is affected by the loss, is sufficient to sustain a recovery on a policy of insurance, although differing in its nature from that which existed at the time when the policy was executed. The assured may therefore recover, notwithstanding an assignment of the property covered by the insurance, in trust for the payment of debts. But to sustain such a recovery it must appear, that the insured has an interest either in the application of the property to the payment of his debts, or in a surplus resulting after the debts are paid. Hence, an assignment, in trust for releasing creditors who actually release, will defeat the right of action on a prior insurance of the property assigned, unless it be shown affirmatively, that a surplus will remain after the debts are paid.*

*A policy conditioned to be void if assigned without the consent of the insurers, will not be avoided by an assignment of all the property and effects of the insured, in trust for creditors, although expressly including all policies of insurance, where the policy in question was in the hands and subject to the lien of an agent, and was not delivered to the assignee.*

[\*THIS was an action on a policy of insurance on a steamboat belonging to the plaintiff, effected on his behalf by Smith & Stewardson, as his agents; and made payable to them in case of loss. The policy contained a proviso, that it should be void if assigned, transferred, or pledged without the consent in writing of the insurers. It appeared from the evidence, that subsequently to the period at which the insurance was effected, and before the loss, on account of which suit was brought, the plaintiff had assigned the steamboat thus insured, together with

\* The syllabus and statement of the reporter are omitted.

several other vessels, and his chattels and effects generally, to one Street, in trust, to pay his creditors according to a certain order of priority, on condition of an absolute release by them within a specified time; the surplus, if any, after the fulfilment of the trust, to be paid over to the assignor. Among the items specified in the assignment, were "all policies of insurance;" but it was proved by the assignee that none were delivered to him at the period when it was executed, although at a subsequent period he had received the sum of \$11,000, insured on the same steamboat in another policy, and had appropriated it in pursuance of the objects of the trust. It also appeared, that the policy on which suit was brought, was in the hands of Smith & Stewardson at the time of the assignment, and that they were then creditors of the plaintiff to a large amount, which had subsequently been paid.

Shortly after the assignment, releases were executed by the greater part of the creditors, who thus acquired an indefeasible interest under the trust. On this state of facts, it was contended by the defendants, that as the debts which the trust was intended to cover, had been absolutely released, the plaintiff retained no insurable interest in the property assigned; and also that the general words, assigning all policies of insurance, necessarily applied to that put in suit, and brought it within the operation of the proviso, rendering it void if transferred or assigned. A verdict was taken for the plaintiff, subject to the opinion of the court on these questions, which, after argument, was delivered by]—

PARKER, C. J. The first question made in this case is, whether the policy is not void, according to the terms of the contract, on account of an assignment of it by the insured. The words of the policy relied upon by the defendants are, "It is also agreed that this policy shall be void, in case of its being assigned, transferred, or pledged, without the previous consent in writing of the assurers." It is contended by the plaintiff that this agreement itself is void, because it is an unlawful restriction upon the right of disposing of property; but we do not think the objection need be carried so far as this. Certainly such an agreement should be construed strictly, and nothing but an effectual assignment, transfer, or pledge, will come within the terms of it. Now in this sense, this policy has not been assigned, transferred, or pledged.

It has no writing upon it signifying any manner of conveyance, nor any instrument attached to it, nor has it been delivered over to any person, but remains in the hands of the agents who procured it for the plaintiff, and has never been out of their possession. The general words contained in the instrument of assignment of all the plaintiff's effects, viz., "and all policies of insurance," we do not think import an assignment of this particular policy, for at that time it was in the hands of Smith & Stewardson, who had a lien upon it to secure a debt to them, and it may be considered as pledged to them with the consent of the insurers, for they stipulate, in case of loss, to pay the proceeds to Smith & Stewardson; and that obligation still remains in force, if Smith & Stewardson should claim to have it executed, unless the plaintiff should make it appear that their lien was removed. The general words in the assignment must be held to affect all such policies as the plaintiff had a legal control over, and cannot be construed to extend to one which at the time was by agreement in the possession and under the control of other persons.

But it is a point of more importance, that the vessel, the subject matter of the insurance, was sold and transferred before the loss happened. Now if this were an absolute transfer, so that no property or interest remained in the plaintiff at the time of the loss, then, according to decided cases, the contract is avoided. The plaintiff could not recover, because he had suffered no loss, and the assignee could not recover, because he was no party to the contract; for which see *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. R. 515; *Locke v. North Amer. Ins. Co.*, 13 Mass. R. 61; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249. But in these cases it is decided, that notwithstanding a conveyance, if it be in the nature of a mortgage, or in trust, with a resulting trust to the insured, so that he has in truth an insurable interest in the property, he may nevertheless recover to the extent of his actual loss. Now the transfer of this vessel, with other property, was in trust to pay over the proceeds to certain creditors of the plaintiff. Had he remained indebted after the making of this assignment, and personally liable in case the property so transferred should be destroyed or lost, then the case would be like that of *Gordon v. Mass. F. & M. Ins. Co.*, for he would be interested in the same degree as before the assignment. But the assignment was upon the condition, that the creditors, for whose use it should be made, should release and discharge the debts, and they were so released and discharged.

\* This changes the nature of the transaction, and takes away from the plaintiff all interest in the property; for whether the vessel insured were lost or not, he was equally discharged, and therefore could not be said to suffer by the loss of the vessel; on the contrary, the whole loss would be to the creditors. But still there was a possibility of interest remaining in the plaintiff, because by the assignment, the surplus, if any should remain after paying the debts, is to be paid to the plaintiff, and it is contended that this possibility is an insurable interest, and so saves the present action. But we do not think such a bare contingency is an insurable interest, nor indeed can it appear that there is even a possibility, unless it be shown that the property conveyed is of greater value than the debts, and that a discreet appropriation of it will leave a surplus. It may be likened to an insurance on profits, in which, to entitle the insured to recover, he must, according to the English doctrine, show, that had the goods arrived safe, profits would have accrued. *Hodgson v. Glover*, 6 East, 316; *Eyre v. Glover*, 16 East, 218. Certainly nothing can be clearer, than that the insured on this policy had no interest in the vessel insured, after his assignment of her, unless there was property enough assigned to pay the debts and leave a surplus. Now this does not appear in the present case, and therefore, according to legal reasoning, there was no insurable interest. In short, it does not appear from the evidence reported, that there was even an expectation of any residuum after paying the debts. The case cited from 5 Bos. & Pul. 269 (*Lucena v. Crawford & al.*), proceeds upon the principle, that an interest in the insured at the time of the loss is essential to the plaintiff's case, and the question was only whether the facts there shown proved such an interest.

The verdict having been returned for the plaintiff, without evidence, of a probable surplus after paying the debts for which the property was assigned, must be set aside, and a new trial granted. There being an absolute transfer of the property assured in actual payment of debts, and not a mere mortgage or pledge, which would stand upon a different footing, the plaintiff, to recover, must give *prima facie* evidence of an amount of property conveyed sufficient to raise a reasonable presumption, that but for the loss of the vessel there would be a surplus; otherwise he fails to show any interest in the property.

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MICHAEL LAZARUS *v.* THE COMMONWEALTH INSURANCE COMPANY.

In the Supreme Court of Massachusetts.

MARCH TERM, 1837.

[REPORTED, 19 PICKERING, 81-98.]

*An assignment of all the assignor's property in trust for releasing creditors, who actually release, will not defeat the right of recovery on a prior insurance of part of the property assigned, where it appears that there is a surplus remaining in favor of the assignor, after the payment of the creditors.*

*Nor will a policy conditioned to be void if assigned, fall within the meaning of words assigning all policies, when it is held by an agent under a lien for a balance of accounts, at the time when the assignment is executed, and is not delivered to the assignee.*

*General words of release or assignment will be construed in accordance with the intention of the parties.*

[THIS case was again tried, in pursuance of the decision of the court as reported 5 Pick. 76. In addition to the evidence given on the former occasion, it was shown by the plaintiff, that all the debts covered by the assignment had been paid in full, and that he was entitled to a surplus which remained in the hands of the assignee. The question, whether this evidence was sufficient to sustain a verdict for the whole amount insured, having been presented among others for the decision of the court in banc, the following opinion was delivered by]

PUTNAM, J. \*This action was tried many years ago, and the verdict for the plaintiff was set aside, and a new trial granted at March term, 1827, as the report in 5 Pick. 76, states, because the verdict was given "without evidence of a probable surplus, after paying the debts for which the property was assigned." The cause was tried a second time at the last November term, when

\* The syllabus and statement of the reporter are omitted, and so much only of the opinion is given, as relates to the question of insurable interest.

a verdict was again returned for the plaintiff, for the whole amount of the loss claimed by the plaintiff, deducting the salvage which he had received.

The cause has now been very ably argued by the counsel on both sides, on the motion for a new trial in behalf of the defendants, on various grounds, which will now be considered.

1. They contend that the plaintiff had, by his assignment to Street, made the policy void.

Such a result could not have been intended ; for the effects and choses in action were assigned upon the express trust to be appropriated to the payment of the debts of the assignor, the surplus, if any, to be paid to himself. It would be absurd for a man to tear off the seal or cancel the bond or policy, at the same time that he assigned the instrument with the intent of having the money due upon it collected for his own benefit. All deeds and other instruments and agreements are to be construed according to the legal intent of the parties ; and a construction which necessarily involves great folly and absurdity, will not be favored.

We propose to consider this point, upon the ground on which the defendants place it, viz., that if the plaintiff assigned the policy without the written consent of the assurers, it would make the policy void. Be it so, for the purpose of this agreement. An assignment of it would be as destructive to the policy as the burning of it up would be. Then it would seem to follow, that the policy never had any effectual assignable quality. We say effectual, because, although the form of words which constitutes a valid assignment should be written upon the policy, no benefit would arise to the assignee, upon the ground taken by the defendants. The act of sealing the assignment would be considered as an act of cancelling the policy. So it was in truth a policy which was not assignable.

But the plaintiff cannot be supposed to have intended to destroy the policy. He could have no motive to do so, and he had every motive of interest to preserve it. If it was included in the description of "all policies," it was with the express intent that the money which should become due upon it, should be collected and paid, or appropriated for his benefit. But as upon the defendants' hypothesis that effect cannot take place, then it follows, that if it is to be considered as being contained in the assignment, the policy thereby became utterly void, and the plaintiff

cannot recover. On the other hand, if it is not contained in the assignment, then this objection is invalid.

It is a familiar rule, that the generality of the words employed in agreements should be restrained, if that should become necessary to ascertain and carry into effect the legal intent of the parties. Now there are other reasons than those which are before suggested, tending to satisfy us that this policy was not included in the assignment. At the time when it was made, the policy was in the hands of Smith & Stewardson, who were then in advance to the plaintiff. They procured it to be made, and the defendants agreed to pay the money to them in case of loss. They might have maintained an action upon this policy in their own names against the defendants. Now it would seem that the plaintiff could not have deprived them of the benefits secured to them by this contract, without their consent. It is true that the plaintiff afterwards paid his debt to them; but that circumstance does not show that the defendants might not have been liable to them for any loss upon this policy which might have happened after the assignment and before they received their payment from the plaintiff. If the policy was made void, it was avoided by the act of assignment; and if it were so avoided, it would follow that Smith & Stewardson's rights, which were secured by the policy, would have been destroyed, without their consent.

It was held in the time of Edward III., that a grant by one of *omnia bona sua*, should pass not only goods which he had in his own right, but those which he had as executor or administrator, because in some sense those were his goods. But the law is held otherwise now, unless the party granting had no goods but as executor or administrator, and if that were the case, then *ut res magis valeat*, &c., the goods which he had as executor or administrator would pass. *Hutchinson v. Savage*, 2 Ld. Raym. 1307.

A release of all errors, actions, suits, and writs of error whatsoever, will not discharge an action of debt upon a bond, and yet the release is, among other things, of *all actions*. So in a writ of annuity, it was pleaded, that the plaintiff released the defendant from payment for half a year, and released to him all actions, suits, and demands. And it was held, that the release did not bar the plaintiff but of the arrearages of a year. *Abree's Case*, Hetley, 15. In the above cases the generality of the words was restrained by the obvious intent. It would be easy to give a page of citations which sustain this general position. We

will cite only one more. An obligor by bond agreed, when and so soon as he should become possessed of, or entitled to, any commission, post, place, salary, pension, or pay whatsoever, that then he would immediately execute a proper assignment thereof to the plaintiff. It was argued for the obligor, that the condition was void, inasmuch as it extended to all offices; and that some offices were not by law assignable. But it was held by Lord Mansfield, that the bond was good as to all offices which were assignable, but void as to those which were not.

So here, the plaintiff had a policy which was not assignable, and he had one or more policies which were assignable, and he assigns all his policies. It seems to us, that such policies only as the plaintiff could legally and effectually assign, were intended to be included in the conveyance.

We are of opinion that this objection cannot prevail.

The loss of a steamboat by a peril insured against, happened on the 22d of April, 1825, within the time covered by the policy. The transfer of the boat by the plaintiff to Timothy Street, on the 23d of December preceding, and the assignment of the plaintiff's property, including the boat, to Street, which was on the same day, were admitted. And the defendants contend, 2dly, that the assignment of the vessel before the loss left no insurable interest in the plaintiff at the time when the loss happened.

This steamboat, and all the other property of the plaintiff, were assigned to Street in trust to pay the expenses of the administration of the fund, and then to pay the plaintiff's creditors as set forth in the assignment, and in the last place, to pay the balance then remaining in the hands of Street, the trustee, for the sole use and benefit of the plaintiff, his executors, administrators or assigns forever, freed and discharged from all further and other trusts. Now the jury have found that there was a surplus of property after paying the creditors who had released the plaintiff, without resorting to any amount due upon this policy.

The evidence upon which the verdict was found, will be a subject hereafter to be considered. But assuming it to be correct, we proceed to consider the objection of the defendants on the ground of a want of insurable interest.

And it seems to us to be perfectly clear, that the transaction amounts to a pledging or mortgaging to the plaintiff's property giving the pledgee or mortgagee a power to sell and dispose of the same, he being to account for the proceeds to the pledgor or mort

gagor. Now the plaintiff had certainly a contingent interest in this vessel. If the trustee should be able, from the trust fund, to pay all the claims under the assignment, and so should have relieved this vessel, if she had not been lost, from the pledge or mortgage, then it would seem to be very clear, that the plaintiff would have been entitled to have the vessel returned, or the proceeds of it paid to him if it had been sold by the trustee. And the same reasoning applies to the plaintiff's claim against the defendants for the loss under the policy. To whom does it belong? Not to the creditors, for they have been paid without any recourse to this property; and besides, it was not assigned to them or to Mr. Street for their use. It seems to us, that it belongs to the plaintiff. If he should recover, he will have the money for his own use; if not, he must alone sustain the loss.

Now it is perfectly clear to us, that the plaintiff had an interest to the extent of the whole amount insured. He wanted to make a provision for the payment of his debts. His property consisted in a great measure, of ships and merchandise, exposed to marine perils. If they arrived in safety, they would be appropriated for the general object; if they should be lost, the loss would fall upon the plaintiff, unless he secured himself by getting insurance against the perils to which they were exposed.

The cases cited by the plaintiff are conclusive to show that the mortgagor has an insurable interest. We refer especially to *Smith v. Lascelles*, 2 T. R. 188; *Locke v. N. American Ins. Co.*, 13 Mass. R. 61; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 258.

The plaintiff's title to the steamboat was good against all the world excepting the assignee. It was transferred to him upon a condition, which has been performed, so that the title of the assignee has been divested. Now it is perfectly clear that a *cestui que trust* has an insurable interest, as well as the trustee. It is not contended but that the plaintiff had an insurable interest at the time when the policy was effected. It is certain that he has not divested himself of his interest absolutely, but only conditionally; and that this property has been relieved from the assignment by the performance of the condition. If the steamboat had not been lost, but should now arrive in safety, the law would give the plaintiff ample means to obtain and hold the vessel. The defendants would keep the premium, and nobody could maintain that the plaintiff should not have his boat. So if she had not been lost, but had gone into the hands of the assignee and

been sold, and the proceeds distributed according to the assignment, the defendants would have held their premium, and the plaintiff would have had the benefit of the vessel, in the increased amount of the surplus remaining, after the payment of the debts. But the policy now represents the vessel. The defendants are just as liable to pay the money for the loss, as Street, the trustee, would be to account to the plaintiff for the vessel if she had arrived and had remained specifically after the creditors were paid.

But it has been further contended, 3dly, for the defendants, that if the plaintiff had any insurable interest in the vessel, it was only such a proportion of her agreed value as the surplus, if any, of the assigned effects, remaining after paying the debts of the released creditors, bore to the whole value of the assigned property. For example, suppose the whole assets to amount to \$115,000, the insurance to be for \$10,000, the debts to amount to \$100,000. The plaintiff's claim would be cut down to about \$1,300. It should be remembered, that none of the transactions under the assignment have the slightest bearing upon the risks which the defendants have assumed by their policy. We know of no rule of law which calls for the establishment of such an apportionment of the plaintiff's interest, and it seems to us that such a rule would be as inequitable as it would be novel.

We have now examined and considered all the objections which have been argued for the defendants, and are all very clearly of opinion, that the plaintiff is entitled to judgment, according to the verdict.

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A policy of insurance is a contract of indemnity under which a recovery cannot be had without showing that the plaintiff was or might have been prejudiced by the event against which the insurers stipulated. The party causes himself to be insured, in other words indemnified, against injury from the perils enumerated in the policy. Damage to the thing covered by the insurance, will not therefore be a cause of action unless it results in loss to the person in whose behalf the insurance was effected. *The Sadler's Co. v. Badcock*, 2 Atkyns, 554. This is commonly expressed by saying that the insured must be interested at the time of the insurance and at the time of the loss—at the time of the loss, for otherwise he will receive no damage from the breach; at the time of the insurance, in order to avoid the objection that the contract was a wager in its inception. *The Sadler's Co. v. Badcock*;

*King v. The State Mutual Ins. Co.*, 7 Cushing, 1, 15; *Carpenter v. The Washington Ins. Co.*, 16 Peters, 495, (post.)

The question is, however, one of damages rather than title or possession, and it will be enough in general to show such a relation between the person for whose benefit the policy was executed, and the property at risk, that injury to it, will in the natural course of things be followed by a loss to him. If this can be established, with the certainty required by the rules of evidence, the plaintiff will be entitled to recover, although the damages are indirect or consequential. *Lucena v. Crawford*, 2 B. & P. New R. 301; *Wilson v. Jones*, 1 Law R. Exch. 193; 2 Id. 139. "He," said Bramwell, B., in *Wilson v. Jones*, "has an insurable interest in an event, who will be benefited if it happens and prejudiced if it does not." It is not necessary, therefore, to show that the insured is the legal or equitable owner of the property at risk; *Buck v. The Chesapeake Ins. Co.*, 1 Peters, 163; but merely that he was so situated by reason of some grant, contract, liability or duty, that he might reasonably expect to be a loser if the property was destroyed. *Lucena v. Crawford*; *Carter v. The Humboldt Ins. Co.*, 12 Iowa, 287; *Herkimer v. Rice*, 27 New York, 253; *Colburn v. Lansing*, 46 Barb. 37. In other words, an insurance may be effected whenever there is a reasonable ground for apprehension that an injury will be sustained on the one hand, or a benefit frustrated on the other, through the operation of the peril against which the insurance is intended to provide. *Wilson v. Jones*, 2 Law Rep. Ex. 139, 151. This criterion is sufficiently accurate for ordinary purposes, but the circumstances which may constitute an insurable interest are so various that they cannot easily be defined, or brought within the compass of any single proposition. "One of the difficulties of the argument," said Story, J., in the case of *Hancox v. The Fishing Insurance Company*, 3 Sumner, 132, (and the same remark will hold good in every similar instance), "is in likening an insurable interest to any other interest in property. The truth is, that an insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Inchoate rights founded on subsisting titles, unless prohibited by the policy of the law, are insurable; as, for example, freight, respondentia and bottomry. So it was held by a majority of the judges in *Lucena v. Crawford*, 5 Bos. & Pul. R. 294, 295. They also held that, where there is an expectancy, coupled with a present existing title, there is an insurable interest; words which approach very near to a description of the present case. After referring to the definitions by foreign jurists, of the contract of insurance, they added: 'These definitions clearly embrace a contingent interest, which is subject to the perils of the seas, and for the loss of which a compensation can be made.' Lord Eldon, although he dif-

ferred from some of the views of the majority of the judges in that case, said: 'I have in vain endeavored, however, to find a fit definition of that which is between certainty and expectation, nor am I able to point out what is an insurable interest, unless it be a right in the property, or right derivable out of some contract about the property, which, in either case, may be lost upon some contingency affecting the possession or enjoyment of the property.'"

It is well settled, in accordance with this view, that a contract for the purchase of real or personal property, confers an interest which may be covered by a policy of insurance. *Ayres v. The Hartford Ins. Co.*, 17 Iowa, 176, 196; 21 Id. 193; *Ayres v. The Home Ins. Co.*, 21 Iowa, 185; *Hough v. The City Fire Ins. Co.*, 29 Conn. 10; *The Columbian Ins. Co. v. Lawrence*, 2 Peters, 151; 10 Id. 507. In *The Columbian Ins. Co. v. Lawrence*, the plaintiff, who had gone into possession of a mill under an executory agreement, was held entitled to recover, notwithstanding a default which rendered the contract voidable, because it might still be ratified and enforced by the vendor. In delivering judgment, Marshall, Ch. J., said: "It is admitted that an equitable interest may be insured. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it, has undoubtedly a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If he has paid the purchase money, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debt may absorb all his property, but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events, does not prevent his loss. We perceive no reason why he should not be permitted to insure against it."

The same principle was applied in *McGivney v. The Phoenix Ins. Co.*, 1 Wend. 85. At the time of effecting the insurance the plaintiff was in possession of the premises under a written contract, and had made extensive repairs and paid one year's interest, but no payment had been made on account of the principal, and the property was surrendered to the vendor immediately after the fire. The court held, that the evidence disclosed an insurable interest entitling the insured to judgment. This decision was followed in *The Etna Ins. Co. v. Tyler*, 12 Wend. 507; 16 Id. 385. Nelson, J., said, that the insured had paid some \$800, and was bound to pay some \$500 or \$600 more. His interest was, therefore, nearly if not quite the same as if he had obtained a deed. It made no difference that the vendor had effected an insurance in *The*



*Merchants' Ins. Co.* He could only recover for the unpaid balance of the purchase money, and the insurers would be subrogated in equity to his remedy on the contract. The two policies were distinct and covered different interests. This view was sustained by the Court of Errors, where Chancellor Walworth observed, that the plaintiff had an insurable interest to the full value of the dwelling house described in the policy. He had paid part of the purchase money, and the destruction of the premises did not exonerate him from liability for the residue. The liability of the underwriters was not less, because the vendor had obtained a policy from another company. His interest was distinct from that of the purchaser, the one having an equitable title to the land, the other a lien for the price. Payment of the loss to the vendor would not preclude him from recovering the balance due by the purchaser, although the judgment would enure to the benefit of the insurers, who would succeed in equity to the rights and remedies of the vendor.

It results from these decisions that a purchaser may insure on two distinct grounds—first, that he has an equitable estate or interest in the thing sold; and secondly, because he is liable for the price. *Shotwell v. Jefferson Ins. Co.*, 4 Bosworth, 1; *Williams v. The Insurance Co.*, 1 Hilton, 345; *Bixley v. The Franklin Insurance Co.*, 8 Pick. 86; *Strong v. The Manufacturing Insurance Co.*, 10 Id. 40; *Curry v. The Com. Insurance Co.*, Ib. 535; *Fletcher v. The Com. Insurance Co.*, 18 Id. 417; *Swift v. The Vermont M. F. Insurance Co.*, 18 Vermont, 305; *The Franklin Insurance Co. v. Drake*, 2 B. Monroe, 471; *Brough v. Higgins*, 2 Grattan, 408; *Motley v. The Manufacturers' Insurance Co.*, 29 Maine, 336; *Angell on Fire and Life Insurance*, 99; *Flanders on Fire Insurance*, 383.

To bring the case within the operation of this principle, the thing sold must, however, be so far designated or specified as to give a right of property, and the contract binding in all other essential particulars. *Warder v. Horton*, 4 Binney, 529; *Camden v. Anderson*, 5 Term, 709; *Stockdale v. Dunlap*, 5 M. & W. 224. It is well settled in accordance with these decisions that a mere disposing purpose will not confer an insurable interest, unless it is clothed with the force of an agreement, or carried into effect by some act operating as a legal or equitable appropriation.

A sale of chattels is valid as between the parties without delivery; and although delivery is essential to the validity of a pledge, *Stainbank v. Fenning*, 11 C. B. 51, 72, it may take place symbolically when the circumstances do not admit of an actual transfer. An endorsement of the bill of lading to an agent or factor who is in advance, or the shipment of goods on board a vessel sent by him, will consequently confer an interest which may be made

the subject of an insurance; *Godin v. The London Assurance Co.*, 1 Burrow, 498; and the same result will follow from any act or declarations that would be upheld as an assignment in equity. *Hill v. Secretan*, 1 B. & P. 315. In *Hill v. Secretan*, the consignment of goods by A. to B., with instructions to hold them for C., to whom he was indebted, was accordingly held to vest an insurable interest in C. A parol agreement for a lien may be as effectual when chattels are in question as a formal mortgage. *Aldrich v. The Equitable Ins. Co.*, 1 Woodbury & Minot, 272. And one of two joint purchasers of a ship may recover the whole value of the vessel from the insurers, on proof that he endorsed the notes given by the other for his share, with an agreement that he should have a lien on it as security. *Martin v. The Fishing Ins. Co.*, 20 Pick. 389, 397.

In general, a mere possibility or expectancy cannot be made the subject of an insurance. A man cannot for instance insure the profits on goods which he does not own, and has not agreed to buy; nor can he insure freight when no cargo has been contracted for or is put on board (post, 815). *Stockdale v. Dunlap*, 6 M. & W. 224; *Routh v. Thompson*, 11 East, 428. Where, however, an act is done, which though revocable, will, if not recalled, result in conferring an interest, there is seemingly no reason why the anticipated benefit should not be protected by an appropriate insurance. In *Putnam v. The Mercantile Ins. Co.*, 5 Metcalf, 386, the plaintiff was accordingly held entitled to insure the commissions which he expected to derive from the sale of a cargo which had been consigned to him for that purpose, although he had not made advances or accepted bills on the faith of the consignment, which might consequently be revoked at pleasure by the consignor.

A lease is a contract for the occupancy of land during a term certain under which the lessee clearly has an insurable interest. *Niblo v. The North American Fire Ins. Co.*, 1 Sandford, 552; *Wright v. Pole*, 1 A. & E., 621; *Laurent v. Chatham Fire Ins. Co.*, 1 Hall, 41; *The Hope Mut. Ins. Co. v. Brolasky*, 11 Casey, 282. The difficulty is as to the measure of the damages, which should ordinarily be limited to the market value of the lease, good will and fixtures. *Niblo v. The North American Ins. Co.* In *Wright v. Pole*, the court of King's Bench set aside an award of arbitrators allowing £450, under such an insurance, for the injury occasioned to the plaintiff as an innkeeper, by reason of his inability to occupy the premises while they were being rebuilt after the fire. Lord Denman said that the claim set up was for profits which might have been insured as such, but could not be recovered under a policy on the house.

A house or building which may be removed at pleasure, by the tenant or other lawful occupant of land, is personal property, or, more

properly speaking, a fixture; 2 Smith's Ldg. Cases, 278, 288, 6 Am. ed.; *Hope Mutual Ins. Co. v. Brolaskey*, 11 Casey, 282; and a tenant who occupies such a structure, with a right to take it away at the end of the term, may consequently recover the whole value of the building under a policy of insurance in the ordinary form, *Laurent v. The Chatham Fire Ins. Co.*, without making any deduction for the cost of removal or the deterioration which would probably result from the process. *Laurent v. The Chatham Fire Ins. Co.*; *The Hope Mutual Ins. Co. v. Brolaskey*; Flanders on Fire Ins. 380. The principle is the same when a house is erected on the land of another under an authority from him, and subject to an agreement that it shall be removed at six months' notice. *Fletcher v. The Fire Ins. Co.*, 18, Pick. 419. If a fixture ordinarily loses by being detached, it may still be sold to the lessor or an incoming tenant for its full value, and this contingency may properly be taken into view in assessing the damages. *Laurent v. The Chatham Fire Ins. Co.*

Whether a disseisor or intruder who erects a building on the land of another has an insurable interest is a question about which there has been some difference of opinion. The language held in *Curry v. The Commonwealth Ins. Co.*, 10 Pick. 541, tends to support the right, which was also recognized in *Miltenberger v. Beacom*, 9 Barr, 198. When, however, the question arose, in *Sweeney v. The Franklin Fire Ins. Co.*, 8 Harris, 337, the court held that the plaintiff, who had taken possession of waste land, on the sea shore of New Jersey, without a grant or license from the State, and erected a hotel, had no interest which could be protected by an insurance. This decision is not in point where the building is erected under a license from the owner of the fee, with the privilege of removal. *Fletcher v. The Com. Ins. Co.*, 18 Pick, 419.

It follows conversely that a building erected on land, without the consent of the owner, or under circumstances which render it a gift in law to him, may be covered by a policy taken out in his name, or for his use and benefit; and the principle has been repeatedly applied to an insurance by a lessor of structures put up by the tenant, and which the latter had no legal right to remove. *Mayor of New York v. The Brooklyn Fire Ins. Co.*, 41 Barb. 231; *The Same v. The Exchange Fire Ins. Co.*, 9 Bosworth, 424; 40 New York, 436; *Oakman v. The Dorchester Mutual Fire Ins. Co.*, 98 Mass. R. 57.

The mere circumstance that the title to the land is doubtful, or contingent, or is merely for life, or *per auler vie*, will not affect the validity of the insurance, or preclude a recovery to the full extent of the injury inflicted by the fire. *Miltenberger v. Beacom*, 9 Barr, 198. A husband consequently, may have an insurable interest in buildings on land belonging to his wife, by virtue of his marital right, or as a tenant for

the curtesy. *The Mutual Ins. Co. v. Diehl*, 18 Md. 86; *Harris v. The York Ins. Co.*, 14 Wright, 341; *Murry v. The Commonwealth Ins. Co.*, 10 Pick. 535; *Abbott v. The Hampden Ins. Co.*, 30 Maine, 414; *The Franklin Fire Ins. Co. v. Drake*, 2 B. Monroe, 47. In *Harris v. The York Mutual Ins. Co.*, Woodward, C. J., said that aside from the interest which the husband clearly had in the preservation of the property, he was an agent in possession, who might insure in his own name, for the benefit of the owner. An insurance by a husband of goods which have been settled on the wife, to her separate use, is within the same principle. *Goulstone v. The Royal Ins. Co.*, 1 Foster & Finlason, 276.

The interest arising from a contract for the purchase of chattels may in like manner be made the subject of a policy, and here, as in the case of land, it is immaterial that no part of the purchase money has been paid, or that the legal title remains in the vendor; *Ryder v. The Ocean Ins. Co.*, 20 Pick. 259; *Kenney v. Clarkson*, 1 Johnson, 385; if there be an appropriation, vesting a legal or equitable right in the purchaser, although the goods are withheld by the vendor or diverted to another purpose. *Sparks v. Marshall*, 2 Bing. N. C. 761. Accordingly, where a debtor shipped goods to his agent, with instructions to deliver them to the creditor, the latter was held to have an insurable interest. *Hill v. Secretan*, 1 Bos. & Pul. 318. Under these circumstances, the debtor is interested in the preservation of the goods as a means of payment, the creditor, in order that he may be paid, and each may insure, without prejudice to a policy taken out by the other. *Godin v. The London Ass. Co.*, 1 Burrow, 498.

In *Godin v. The London Ass. Co.*, Meyboehm, a merchant, residing in St. Petersburg, shipped goods to Aymand & Co., in England. They were his factors and he was indebted to them on a balance of accounts. The goods were laden on board a vessel which had been sent by Aymand & Co. for the purpose, and Mayboehm wrote advising them of the shipment, and promising to forward the bill of lading, which was, however, soon after endorsed to the plaintiff for a valuable consideration; and as it would seem, without notice of the prior lien of Aymand & Co., Lord Mansfield said there were two distinct interests, one in the factors under the lien for the unpaid balance on the goods as delivered on board their vessel, the other in the plaintiff as the endorsee of the bill of lading. Both might be insured, and a recovery on the policy which had been taken out to protect the former, would not in any wise prejudice or impair an insurance effected on the latter. It was not a case of double insurance, and the defendants were liable to the full extent of the policy.

In *Warder v. Horton*, 4 Binney, 529, a merchant in Liverpool consigned goods to his agent in Philadelphia, in the plaintiffs' vessel, with

instructions to deliver them to the plaintiff on the payment of £445, 10s., which had been expended in the purchase of the cargo and for the repairs and charges of the vessel while in port. If the plaintiffs refused to accept the cargo on these terms it was to be sold, and the proceeds remitted to the consignor. The ship and cargo were lost during the voyage from Liverpool. The court were of opinion that what the evidence disclosed was a mere offer, which unaccepted, conferred no right or title that could be made the subject of an insurance. The principle is indisputable, but it was not perhaps sufficiently considered that the consignor was acting as the plaintiffs' agent, and bought the goods on their behalf. If in so doing, he exceeded his authority, the act might be ratified or disaffirmed by them, but it does not follow that they were bound to elect before effecting the insurance. Nor was the right to insure necessarily precluded by the course of the consignors, in retaining the control of the cargo as security for the advances made in Liverpool. The lien of a factor or agent is entirely consistent with a concurrent right of property in the principal, and each may insure *pro interesse suo*.

When, however, the contract fails in consequence of not having been reduced to writing or is invalid from any other cause, *Ohl v. The Eagle Ins. Co.*, 4 Mason, 172; *Seamans v. Loring*, 1 Id. 127; *Stainbank v. Fenning*, 11 C. B. 51 it will not confer an insurable interest; and the purchaser cannot rely upon his belief or expectation that the vendor will consider himself bound in honor to deliver the goods, as a reason why he should be permitted to enforce the policy. *Stockdale v. Dunlap*, 6 M. & W. 222. The law was so held in *Stockdale v. Dunlap*, although the goods had been shipped by the vendor, and were lost at sea while on their way to the purchaser. In like manner an hypothecation of the vessel by the master for advances made at a foreign port, which fails from a want or excess of power, or as assuming to bind the owner personally will not confer an insurable interest. *Stainbank v. Fenning*, 11 C. B. 51. In *Stainbank v. Fenning*, Jarvis, C. J., said, that such a pledge conferred no right at common law, and was not within the jurisdiction of the Court of Admiralty. The lender was consequently a creditor at large, and could not insure the vessel.

The mere circumstance that the safe arrival of the ship or cargo will put the debtor in funds, and that if they do not arrive he will be insolvent and unable to pay the creditor, is not an interest which can be made the subject of an insurance by the latter. See *Mansfield v. Maitland*, 4 B. Ald. 582; *Palmer v. Pratt*, 2 Bing. 185; *Murray v. The Columbia Ins. Co.*, 11 Johnson 382. And the law was so held in *Murray v. The Columbia Ins. Co.*, although the consignor had directed his correspondent to place the proceeds of the cargo to the credit of the plaintiff to whom he was indebted for money lent.

The contract of sale is not the only one that will give birth to an insurable interest; it may arise from work done and services performed in keeping, manufacturing, or carrying a chattel for a stipulated compensation. Under these circumstances the contracting party may insure against any event that will, by preventing the completion of the service, deprive him of the promised reward. *The Franklin Ins. Co. v. Coates*, 14 Maryland, 285. He may have no interest in the property at risk, but he has an interest that the destruction of the property should not deprive him of the right to compensation under the contract, and a mechanic, who is by the terms of the contract to be paid on the completion of the house or vessel which he has engaged to build, may insure within this principle. *The Franklin Fire Ins. Co. v. Coates*. In like manner, an agent or supercargo who is by the terms of the agreement to be paid out of the proceeds of the goods entrusted to his care, has an interest in their preservation, which may be covered by an appropriate insurance. *Robinson v. New York Ins. Co.*, 2 Caines, 357; *The New York Ins. Co. v. Robinson*, 1 Johnson, 616; *Wells v. The Phila. Ins. Co.*, 9 S. & R., 103. In delivering judgment in the Court of Errors, Senator Clinton said that, if the adventure terminated successfully, the plaintiff was to receive an extraordinary compensation; if it failed, he was to receive nothing. He might, therefore, secure the benefit of the contract by insuring the sum agreed to be paid as a reward for his services. A similar decision was made in *Wells v. The Phila. Ins. Co.* In both these instances, however, the insurance was specifically on commissions.

In like manner, the shipment of goods confers an inchoate right to freight on the owner of the vessel, which may be covered by a policy; and so does a contract to supply the whole or a part of the lading for a specific voyage, although the goods are not actually put on board, in consequence of the loss of the vessel. In the latter case, the agreement is express; in the former, implied, from the act of the shipper in sending the goods and that of ship-owner in receiving them for carriage; but a contract in some form is essential to the existence of an insurable interest in freight, in the strict sense of the term. *Flint v. Fleming*, 1 B. & Ad. 45; *Adams v. The Penn. Ins. Co.*, 1 Rawle, 99. In other words, it must appear that there was an inchoate right which would have been perfected by the completion of the voyage. In the absence of such evidence, it will not be enough that the plaintiff had a well founded hope or expectation of obtaining a cargo, which was frustrated by the loss of the vessel. If such a possibility affords ground for insurance, it should be described as profits, and cannot be covered by an insurance on freight. *Flint v. Fleming*; *Knox v. Wood*, 1 Campbell, 532; *Tonge v. Watt*, 2 Strange, 1251; *Livingston v. The*

*Columbia Ins. Co.*, 3 Johnson, 49; *Reilly v. The Hartford Ins. Co.*, 2 Conn. 368. It is, therefore, a *prima facie* answer to a policy on freight, that the goods were not on board; *Tonge v. Watts*; *Hart v. The Delaware Ins. Co.*, 2 Washington C. C. R. 346, 350; but the insured may still recover, by proving a contract for the shipment of goods, or that the ship had been chartered for the whole voyage, and was lost on the way to an intermediate port, where she was to take up her cargo. *Barber v. Fleming*, 5 Law Rep., Q. B. 59; *Flint v. Fleming*; *Hart v. The Delaware Ins. Co.*; *Foley v. The United F. & M. Ins. Co.*, 5 Law Rep., C. P. 155; *Thompson v. Taylor*, 6 Term, 478. In *Thompson v. Taylor*, Lord Kenyon said the contract was entire, and the court could not divide it; the ship was to sail from London to Teneriffe, where she was to take wine on board and carry it to the West Indies. The plaintiff was to receive freight for the whole voyage, and had performed part of the contract; he was, consequently, entitled to compensation for the event by which he had been prevented from completing it. In like manner, where a ship which had been chartered for a voyage from London to Dominica, and back to London, was lost at Dominica, before any part of her homeward cargo was on board, the owners were held entitled to recover under a policy on freight, at and from Dominica to London. *Horncastle v. Stewart*, 7 East, 400. In these instances, the contract was entire for a specific voyage, but a recovery may equally be had where an agreement for the shipment of goods is defeated by a peril for which the insurers are answerable.

In *Flint v. Fleming*, a contract by a commercial house in India, to ship 122 tons of saltpetre by a vessel belonging to the plaintiff, and then lying in the roads at Madras, was held to confer an interest which might be insured as freight, although the ship was destroyed by a violent storm before any portion of the goods was put on board, and a reference was ordered, for the purpose of ascertaining whether a proposition, by the same house, to ship 90 tons of light goods, had been so far accepted by the master as to be a contract within this principle.

The owner of a ship may obviously derive as much or more benefit from employing her to carry his own goods to a better market, as he would from the compensation paid for the transportation of the property of other people; and it has been held that the interest arising under these circumstances is not only insurable, but may be designated in the policy as freight. "If," said Lord Tenderden, in *Flint v. Fleming*, "it be a necessary ingredient in the composition of freight, that there should be a money compensation paid by one person to another, the benefit accruing to a ship owner from using his own ship to carry his own goods is not freight. But if the term freight, as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the

ship-owner, whether he receives that benefit for the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in the policy. Before the statute of the 19 G. 2, c. 37, it was not necessary to prove any interest in the subject matter of insurance. Since that statute it would be as good a proof of interest in freight to show that the owner of a ship was conveying his own goods in his own ship, as that he was conveying the goods of others." And it was consequently decided, that the underwriters were liable for the freight of twenty-five tons of red-wood, which had been purchased for the owners of the vessel, and was ready to be shipped at the time when she was destroyed.

The doctrine is an established one, and has been applied in several instances in England and the United States. *Huth v. The New York Ins. Co.*, 8 Bosworth, 538; *De Vaux v. J<sup>r</sup> Anson*, 7 Scott, 507; *Adams v. The Pennsylvania Insurance Co.*, 1 Rawle, 97; *Clark v. The Ocean Insurance Co.*, 16 Pick. 289; *Wolcott v. The Eagle Insurance Co.*, 4 Id. 429; *Robinson v. The Manufacturers' Insurance Co.*, 1 Metcalf, 143. "The owners of a vessel," said Putnam, J., in *Walcott v. The Eagle Insurance Co.*, "may insure the safe transportation of their own goods, under the name of freight, just as well as if the ship were employed by them to carry the goods or property of others. In the latter case, they are to receive a reward for the transportation; in the former, their compensation arises from the increased value of the property at the port of discharge." A similar view was taken in *Clark v. The Ocean Ins. Co.*, where it was said that whether the profit of the owner was derived from carrying his own goods, or the goods of others, it was equally freight within the meaning of the policy and might be so insured.

If the plaintiff owns the goods, and has them in readiness for shipment, they need not actually be on board, but it will not be enough that he intends to purchase or procure a cargo, and has remitted goods or money for that purpose. *Forbes v. Aspinwall*, 13 East, 323. In *Forbes v. Aspinwall*, the insurance was on freight, valued at £6,000, at and from any port in Hayti to Liverpool. The vessel sailed from England with merchandise, which was to be exchanged for a homeward cargo. Part of the goods were accordingly bartered after her arrival at Hayti for fifty-five bales of cotton, and she was then lost with the residue of the outward cargo on board. The court held that the valuation did not apply, and the recovery must be limited to the freight of the cotton which had been shipped before the loss occurred.

The same principle was applied in *Adams v. The Penna. Ins. Co.*, 1



Rawle, 97. The policy was on freight valued at \$4,000, on a voyage at and from Gibraltar to Bordeaux, and thence back to Philadelphia. The vessel sailed from Gibraltar without a cargo, but having on board \$20,000 in specie, which were, agreeably to the instructions of the owners, to be used in purchasing brandy, if it could be had at 240 francs per pipe; if not, the master was to proceed to St. Petersburg and procure a cargo of iron. The vessel was lost at sea on her passage to Bordeaux. Huston, J., said that there was no cargo belonging to the owner and ready to be shipped, nor any contract to provide a cargo. There was at most a reasonable hope of obtaining a cargo, which did not constitute a sufficient ground for insurance. The general principle is clear, but the court omitted to consider the question whether the specie on board was not a "good," entitling the plaintiff to recover, under the rule laid down in *Flint v. Fleming*. Freight may be earned by the carriage of money as well as of any other commodity. See *Woolcot v. The Eagle Ins. Co.*, 4 Pick. 429. And if so, the transportation of the dollars was freight within this principle.

Whatever doubt may exist on this point, there is none that an owner is entitled to insure the profit which he may reasonably expect to derive from the use of his land or goods. This is as true of a vessel as it is of property of any other kind, and if such an insurance be effected by a time-policy, or for a specific voyage, there is seemingly no reason why it should not be enforced. In *Hart v. The Delaware Ins. Co.*, 2 Washington C. C. Rep. 346, a policy was obtained on freight for a voyage from Philadelphia to Wilmington, N. C., and thence to Barbadoes and back to Philadelphia. The vessel sailed in ballast and was lost by the way. A cargo was said to be awaiting her at Wilmington, but there was no proof of any contract. Washington, J., said that, although the plaintiffs had no interest in freight, they might still insure the profit which would probably have accrued if the vessel had reached Wilmington and taken the goods on board.

Considering all the circumstances, that the defendants knew that the cargo was to be shipped at Wilmington, that the ship and freight were insured at the same premium, and that, by the terms of the memorandum to the policy, the vessel was insured in and out of port during the whole voyage, the court were of opinion that the risk in respect to freight was understood to commence as soon as the voyage commenced—that is, that the profit expected to be made by the freight of the vessel should not be prevented by any of the perils insured against.

The difficulty of proving interest where freight is concerned, sometimes leads to the insertion of a clause that the insurers shall be answerable, whether the goods are or are not carried, which will dispense with the necessity for evidence that a cargo was on board or had been contracted for. *De Longuemere v. The Phoenix Ins. Co.*, 10 John-

son, 127. Such a stipulation is not necessarily a wager, because a ship owner who sends his vessel out to look for a cargo has an interest in her safe arrival at a port where one will probably be found, and may justly ask for indemnity against a peril by which his anticipations are defeated, although he cannot prove the loss with the certainty of legal evidence.

There are some other prospective and contingent interests, which may properly be made the subject of insurance. Thus the anticipated profits of goods that have not yet arrived, and even commissions on the sale of goods which have been consigned, may be specifically insured, although the interest may be defeated in the one case by a revocation of the authority, and, in the other, by a fall of the market. *Grant v. Parkinson*, 3 Douglas, 16; *Barclay v. Cousins*, 2 East, 544; *Frinck v. The Hope Ins. Co.*, 16 Pick. 39; *Putnam v. The Mercantile Ins. Co.*, 5 Metcalf, 386. The English courts require some evidence that a profit would have been made if the goods had arrived in safety. *Hodgson v. Glover*, 6 East, 316; *Eyre v. Glover*, 16 Id. 218. But a different rule prevails in this country, under which a recovery may be had on proof of an interest in the goods themselves, without showing that they could have been sold to advantage. *The Patapsco Ins. Co. v. Coulter*, 3 Peters, 262.

It is not essential to a recovery, under an insurance on profits, that the goods should have been shipped; but when the terms of the insurance were at and from Madras to London "on profit on rice laden or to be laden, beginning the adventure upon the goods immediately after the loading thereof," the Excheq. Chamber held, overruling the judgment of the court below, that the risk did not, by the express terms of the policy, commence until the rice was put on board the vessel. *McSwiney v. The Royal Ex. Ass. Co.*, 14 Q. B. 634, 646.

The position of a charterer who receives the goods of a third person for transportation, is so far peculiar that his liability to the owner of the vessel, and that of the shipper of the goods to him, depend on the completion of the voyage. It has, accordingly, been said that if a charterer has an insurable interest it cannot be insured as freight, and must be specifically set forth or described in the policy. *Cheriot v. Barker*, 2 Johnson, 346; *Riley v. Delafield*, 7 Id. 522; *Robins v. The New York Ins. Co.*, 1 Hall, 325; *Mellen v. The National Ins. Co.*, Ib. 452. The better opinion would, however, seem to be that a charterer who underlets the vessel or employs her generally in carrying the goods of third persons, acquires an interest which may be covered by an insurance on freight; 1 Arnould on Ins. 259; *Clark v. The Ocean Ins. Co.*, 16 Pick. 289; and such is confessedly the rule when the charterer pays absolutely in advance; *Lee v. Barreda*, 16 Maryland, 196, or the freight payable by the shippers to him by virtue of his qualified ownership,

exceeds the amount due by him to the owner, for the use of the ship for the voyage. *Clark v. The Ocean Ins. Co.* See *Mellen v. The Nat. Ins. Co.*, 1 Hill, 467; *Lee v. Barreda*, 16 Maryland, 196. *Huth v. The New York M. Ins. Co.*, 8 Bosworth, 538.

An absolute sale necessarily puts an end to the insurable interest of the vendor, and will preclude a recovery on the policy unless it is expressly or impliedly assigned for the benefit of the purchaser. The assignee is a stranger to the contract, and the vendor cannot recover for a loss where he is not injured. *Carpenter v. The Washington Ins. Co.*, 16 Peters, 495 (post). When, however, the conveyance is a security or mortgage, the grantor is, in contemplation of equity, as much the owner as he was before. If the property is applied to the payment of the debt, his obligation is to that extent discharged. If the debt is paid from other sources the property will belong absolutely to him. In either aspect he has an interest in the preservation of the property which may be covered by an insurance (ante).

It is accordingly well settled that, while the equity of redemption still exists, and may be asserted by the mortgagor, he has an insurable interest to the full value of the property, without regard to the liens by which it is encumbered, and although they would exceed the amount that it would bring if sold under the most favorable circumstances. *Strong v. The Manf. Ins. Co.* 10 Pick. 40; *Jackson v. Mass. F. I. Co.*, 23 Id. 413; *Fulton v. Brooks*, 4 Cushing, 203; *Conover v. The Marine Ins. Co.*, 1 Comstock, 290; *Stephens v. The Illinois M. F. Ins. Co.*, 43 Ill. 327; *Cushing v. Thompson*, 24 Maine, 496; *Pollard v. The Somerset F. Ins. Co.*, 42 Id. 221. It will make no difference in the application of this principle, that the mortgagee has entered by virtue of the legal title, if the right of redemption is not cut off by the foreclosure of the mortgage. *The Ins. Co. v. Lawrence*, 2 Peters, 25. And this holds good even when the conveyance is absolute in terms, if it is made in consideration of a pre-existing or cotemporaneous debt which is not satisfied, because chancery looks to the substance of the transaction and disregards the form (ante). *Holbrook v. The American Ins. Co.*, 1 Curtis 193; *Taintor v. Keys*, 43 Illinois, 332; *Swift v. Vermont M. F. Ins. Co.*, 20 Vermont, 546; *Gordon v. The F. & M. Ins. Co.*, 2 Pick. 249; *Gilbert v. The North American Ins. Co.*, 23 Wend. 43; *Flanders on Fire Insurance*, 358; 3 *Leading Cases in Equity*, 608, 3 Am. ed. A parol memorandum may accordingly control an absolute deed, and show that it did not divest the insurable interest of the grantor. *Gordon v. The Fire & Marine Ins. Co.*, 2 Pick. 240. "The effect of the transaction," said Parker, C. J., "amounts to nothing more than a pledge or mortgage of the vessel, to secure a debt, or as an indemnity. Admitting that the memorandum not under seal, could not, for that reason, amount in law to a defeasance of the

deed of sale, yet if it was so intended between the parties, the covenant which was afterwards substituted, would in equity have that effect, so there can be no doubt that a court of equity would compel a re-conveyance of the vessel if the Hooles should have been indemnified without a sale of her, and if sold they would be compelled upon their covenant to discharge so much of the debts of the plaintiffs, as the proceeds would amount to, or answer for damages at law upon their covenant. Certainly, then, the plaintiff was interested in the vessel at the time of the loss, for he is thereby left indebted to an amount equal to her value, which but for the loss, would have been discharged."

The principle is the same whether real or personal property is in question; *Rice v. Tower*, 1 Gray, 46; and has been enforced under a great variety of circumstances. In *Locke v. The North America Ins. Co.*, 13 Mass. 61, the plaintiff was held to have an insurable interest in a cargo which had been purchased by a third person, who took the legal title in his own name, because it appeared from the declarations of the latter, as proved by the witnesses, that the money was in fact advanced for the benefit of the plaintiff, and that the risk of the adventure was to be his.

A levy by the sheriff does not affect the insurable interest of the defendant in the execution, because the property will either go to satisfy the obligation or revert to him if the execution is withdrawn; *Franklin Fire Ins. Co. v. Findlay*; 6 Wharton, 483, and this is equally true of an assignment for the benefit of creditors, if they do not release, or there is a resulting trust in favor of the assignor. *Gordon v. The F. & M. Ins. Co.*; *Lazarus v. The F. & M. Ins. Co.* (ante).

The rule applies whether the mortgage or defeasible deed is subsequent or prior to the insurance, and even when the policy is conditioned to be void if the premises are sold or aliened without the consent of the insurers. *Higginson v. Dall*, 13 Mass. 96; *Rollins v. The Conn. F. Ins. Co.*, 5 Foster, 200; *Pollard v. The Sun M. F. Ins. Co.*, 42 Maine, 221. When, however, the policy is conditioned broadly against alienation, or provides that the insurance shall be void if any change is made in the ownership or title by an assignment in insolvency or for the benefit of creditors, it will not be an answer to a forfeiture incurred by such a sale or transfer, that the grantor retains an insurable interest and would have been entitled but for the express words of the contract. *Young v. The Eagle Ins. Co.*, 14 Gray, 150; *Edmunds v. The M. Safety Ins. Co.*, 1 Allen, 311; *Hazard v. The Franklin Ins. Co.*, 7 Rhode Island, 429; *Abbott v. The Hampden M. Ins. Co.*, 30 Maine, 414; *Tomlinson v. The Monmouth Ins. Co.*, 47 Id. 232; *The Western Ins. Co. v. Riker*, 10 Mich. 279. And while a mortgage will not be a breach of condition not to sell, alienate, or assign; *Rice v. Tower*, 1 Gray, 426; *Conover v. M. F. Ins. Co.*, 3 Denio, 254; *Shepherd v. The Union Ins.*

Co., 38 New Hamp.; *Smith v. Monmouth Ins. Co.*, 30 Maine, 50, 96; it may invalidate a policy so worded as to leave no doubt of the intention to prohibit the incumbrance of the property without the consent of the insurers.

In like manner an unpaid vendor who retains a lien for the price, may enforce an existing policy or effect a new insurance; *Norcross v. The Ins. Co.*, 5 Harris, 429; *Ayers v. The Hartford Ins. Co.*, 17 Iowa, 176; *Hitchcock v. The Northwest Ins. Co.*, 26 New York, 681; *The Ins. Co. v. Updegraff*, 9 Harris, 513; and there is no substantial difference when the property is delivered or conveyed, and a purchase money pledge or mortgage taken by the vendor. *Morrison v. The Tenn. M. F. Ins. Co.*, 18 Mo. 262; *Phillips v. Gebhard F. Ins. Co.*, 9 Bosworth, 404; *Stetson v. The Mass. M. F. Ins. Co.*, 4 Mass. 330; *Hitchcock v. The Northwest Ins. Co.*

The sale of an equity of redemption subject to the mortgage does not divest the insurable interest of the mortgagor. Under these circumstances the mortgaged premises are a fund for the payment of the debt, and the vendor may have recourse to them for indemnity. He will consequently be a loser if they are destroyed, and may protect his interest by an insurance. *Strong v. The Marine Ins. Co.*, 10 Pick. 43; *The Buffalo Steam Engine Works v. The Sun M. & F. Ins. Co.*, 17 New York, 401, 404; *Wilkes v. The Peoples Ins. Co.*, 19 Id. 184. In like manner the assignment of a mortgage will not defeat the insurable interest of the mortgagor, if he guarantees the bond or the solvency of the obligor; *The New England Ins. Co. v. Wetmore*, 32 Illinois, 221. "In case," said Pratt, J., in *The Buffalo Steam Engine Works v. The Sun M. Ins. Co.*, "of a debtor assigning property to be disposed of, and the proceeds applied to the payment of his debts, he still has an insurable interest in the property to its full value, so long as the debts, to discharge which the property is assigned, remain in force against him and are unsatisfied and unreleased." (Phill. on Insurance, § 287; *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249). Upon the same principle, the mortgagor retains an insurable interest in the mortgaged property, although he dispose of the equity of redemption absolutely, so long as he is personally liable for the payment of the mortgage debt. By disposing of the property subject to the mortgage it becomes the primary fund for the payment of the mortgaged debt. The loss of the property, therefore, would be a direct loss to the mortgagor who is personally responsible for the payment of the debt. There was in this case, therefore, no want of interest in the mortgagor, if any interest in him was required after the assignment of the policy to continue the validity of it. It is not claimed but that the mortgagee had an insurable interest, so that if by the assignment the entire interest in the policy passed to him it would be a valid policy in his hands.

A loan on bottomry or respondentia differs from an ordinary hypothecation, because the obligation of the debt will be discharged if the voyage is frustrated by the loss of the vessel. The injury arising from such a disaster will consequently be balanced as it regards the borrower, by a corresponding gain, and it has been held to follow that he has no insurable interest unless the value of the ship exceeds the amount advanced. *Arnould on Insurance*, 244; 1 *Phillips on Insurance*, 113; *Williams v. Smith*, 2 *Caines*, 132; 2 *Caime's Cases*, 110. For as the adventure is, under these circumstances, virtually at the risk of the mortgagee, the mortgagor does not stand in need of an insurance. This argument, however, only applies where the loss is total, because a partial loss will not satisfy the bond or discharge the lien on the vessel. *Emerigon Traite des Contrats*, chap. 1, § 4; *Thompson v. The Royal Exchange Ins. Co.*, 1 *Maule & Selwynn*, 30; *Pope v. Nickerson*, 3 *Story*, 465.

In *Williams v. Smith*, the purchase of a vessel subject to a bottomry bond, was said not to confer an insurable interest, because the property was hypothecated for more than it was worth. In general, however, the possession of personal property coupled with an accountability for it to another, is sufficient ground for an insurance. *Marks v. Hamilton*, 7 *Excheq.* 325. A bankrupt or insolvent who remains in possession may insure under this principle, although the title is in the assignee; *Marks v. Hamilton*; *Goulstone v. The Royal Assurance Co.*, 1 *Foster & Finlason*, 276; see *Webb v. Fox*, 7 *Term*, 391; and so may the finder of a chattel, and generally any bailee who is responsible to the owner, *Steele v. The Franklin Ins. Co.*, 5 *Harris*, 290; *The Railroad v. Glen*, 1 *Ellis & Ellis*, 651; *The Columbia Ins. Co. v. Cooper*, 14 *Wright*, 331. Such a qualified property will support trover or replevin, and should therefore be a sufficient ground for an insurance. *Webb v. Fox*; *Armory v. Delamire*, 1 *Strange*, 594; 1 *Smith's Leading Cases*, 592, 6 *Am. ed.*

It is also held, in general, that a charge or incumbrance on the title of a purchaser, will not preclude him from insuring, or prevent a recovery for the full value of the property at risk without regard to the lien. Under these circumstances the buyer may not be personally liable for the debt, but he is the owner of the thing, and the existence of the incumbrance will not be a defence unless there is a provision to that effect in the contract of insurance. *Borden v. The Hingham M. & F. Ins. Co.*, 18 *Pick.* 523. In *Borden v. The Hingham Ins. Co.*, the plaintiff insured the equity of redemption in a house and lot subject to a mortgage, for \$1,600. He subsequently insured the house for \$1,500. The value of the premises was, agreeably to the highest estimate, less than \$2,600. It was, notwithstanding, held that as there was no fraud,

and the defendants had insured with a knowledge of the facts, judgment should be entered for the full amount of the insurance.

It may be observed that when the same thing is claimed by two different persons, each has an interest that may be made the subject of insurance, and the court will not, as it would seem, inquire which has the true or better title. If this has not been expressly decided it is a logical inference from established principles. *Godin v. The London Assurance Co.*; *Wells v. The Philadelphia Ins. Co.*, 9 S. & R. 103; *Fletcher v. The Commonwealth Ins. Co.*, 18 Pick. 419; *Fox v. The Phoenix Ins. Co.*, 52 Maine, 333. If, for instance, the plaintiff or defendant in an ejectment were each to insure in good faith and without undue concealment, payment of the loss to one would not be a defence to the policy effected by the other, nor could the insurers rely on the result of the ejectment, as precluding the unsuccessful party.

A pledge or hypothecation by a debtor confers an interest on the creditor which he may protect by a policy of insurance. Under these circumstances, injury to the property at risk must necessarily diminish the value of it as a security, and may result in the loss of the debt. The right of a mortgagee to insure is accordingly one of the best settled heads in this branch of the law; *Ayres v. The Hartford Ins. Co.*, 17 Iowa, 176; 21 Id. 193; *Ayres v. The Home Ins. Co.*, 21 Iowa, 185; *Woodruff v. The Insurance Co.*, 2 Dutcher, 54; *Jackson v. The Massachusetts Fire Ins. Co.*, 23 Pick. 413; *Connover v. The Marine Ins. Co.*, 1 Comstock, 290; *Fulton v. Brooks*, 4 Cushing, 203; *French v. Rogers*, 16 New Hamp. 177; and a similar right will exist wherever a course of dealing or agreement results in a lien, although arising incidentally and not from a formal conveyance. *Wilson v. Marten*, 11 Exchequer, 684; *Lee v. Barreda*, 16 Maryland, 198. A mechanic or material man who has filed a claim may insure within this principle; *Longhurst v. The Star Ins. Co.*, 19 Iowa, 304; *The Franklin Ins. Co. v. Coates*, 14 Maryland, 285; *Stout v. The City Ins. Co.*, 12 Iowa, 371; and so may a consignee who has a lien for advances; *Godin v. The London Ins. Co.*, 1 Burrow, 489; or a lender who gives credit on the faith of an assignment of a qualified or special right of property in the nature of a lien on the proceeds of a cargo. *Wells v. The Ins. Co.*, 9 S. & R. 103. In like manner an insurance by a partner in general terms, will extend beyond his title, as a joint owner, to his lien on the property of the firm for a specific advance, or general balance of accounts; *Caruthers v. Sheddon*, 6 Taunton, 14; and where the owners of a fishing vessel had a lien on the shares of the crew in the catch of fish for advances made to them individually at the commencement of the voyage, it was held to be an insurable interest, which might be covered by a policy in the ordinary form. *Hancox v. The Fishing Ins. Co.*, 3 Sumner, 132.

It results from the same principle, that the sale of the property at risk will not invalidate the insurance where the vendor retains the legal title as a security or takes a purchase money mortgage. *Stetson v. The Mass. M. F. Ins. Co.*, 4 Mass. 330; *Varin v. The Canal Ins. Co.*, 10 Ohio, 323; *Trumbull v. The Portage M. F. Ins. Co.*, 12 Id. 305; *The Ins. Co. v. Updegraff*, 9 Harris, 513; *Williams v. The Ins. Co.*, 1 Hilton, 345. And these cases establish what is too well settled to be questioned, that a lien or security is not only an insurable interest, but one which may be covered by a policy in the ordinary form, without specifying the special and limited nature of the right insured. *Caruthers v. Shedden*, 6 Taunton, 14; *Lee v. Barrada*, 16 Maryland, 199; *The Ins. Co. v. Woodruff*, 2 Dutcher, 541, 552. It is not an answer to an action on such a policy, that the creditor has other security, or that the debtor is solvent and will pay the money if recourse is had to him. The insurance is not of the debt but on the goods or building, and the debt is only material as a connecting link in the evidence through which the title of the plaintiff is deduced. *Kernochan v. The New York B. Ins. Co.*, 5 Duer, 1; 17 New York, 428; *The Ins. Co. v. Updegraff*, 9 Harris, 513. Nor will it be a defence to show that the lot is an ample security for the debt notwithstanding the destruction of the building. *The Ins. Co. v. Updegraff*. In *Hancox v. The Ins. Co.*, judgment was accordingly given against the insurers, notwithstanding the argument that the plaintiff was a creditor and not an owner, and would not be prejudiced by the loss of the cargo unless the mariners were insolvent and unable to pay the debt which they had incurred. "It has been suggested," said Story, J., "that the plaintiff has in fact sustained no loss, because, for anything that appears, he may still recover the debts due to him from the seamen, and if so, he has sustained no loss. The objection has already been in effect answered. The question is not in cases of this sort, whether the party has actually lost his debt, which, if caused by insolvency or death of the debtor, would not be by a peril within the policy, but the question is, whether he has lost the security for the debt by the perils insured against, which the underwriters agreed to assume upon themselves. A mortgagee or consignee of property, may recover his insurance if the property mortgaged or consigned, is lost in the voyage, although the mortgagor or consignor still remain his debtor, and is solvent."

The mode in which the hypothecation is effected will be immaterial if it operates in law or equity as an appropriation of the property at risk; and an order or bill of exchange, drawn against or payable out of a particular fund, may be as effectual as the most formal deed. *Wilson v. Martin*, 11 Excheq. 684; *Wells v. The Philada. Ins. Co.*, 9 S. & R. 103; 3 Leading Cases in Equity, 358, 3 Am. ed.

It seems to have been thought in *Grevenmeyer v. The Southern M. F.*



*Ins. Co.*, 12 P. F. Smith, 340, that a general lien covering all the property of the debtor does not confer an insurable interest, but the point actually decided by the court was, that a vendor who conveys the legal title and takes a judgment as security for the purchase money, cannot recover under a prior policy of insurance.

The extent and nature of the insurable interest of a mortgagee is a question of considerable difficulty, owing to the ambiguous nature of his estate which extends at law to the whole title of the property, while it is limited in equity to a lien or security. *The Concord Ins. Co. v. Woodward*, 45 Maine, 457.

The subject admits of two different views which are not reconcilable. Agreeably to one a mortgagee is simply a creditor having a specific lien for the debt. His insurable interest is derived from this source, and has no other foundation. It is said to follow that an insurance in his name is but an insurance of the debt, and will fail if the debt is paid or extinguished, although subsequent to the happening of the loss. *Carpenter v. The Washn. Ins. Co.*, 16 Peters, 495; *The Ins. Co. v. Woodruff*, 2 Dutcher, 541; *Smith v. The Columbia Ins. Co.*, 5 Harris, 253. "Notwithstanding the form of the contract," said Gibson, C. J., in *Smith v. The Ins. Co.*, "a mortgagee insures whether generally or specially, not the ultimate safety of the whole of the property, but only so much of it as will be enough to satisfy his mortgage. It is not the specific property that is insured, but its capacity to pay the mortgaged debt, in effect the security is insured." By a necessary inference from these premises, the underwriters are entitled on paying the loss, to an assignment of the mortgage, and as it would seem of the right to proceed personally for the debt against the mortgagor. Such a payment is as much a purchase, as if it were made by a surety or guarantor. The debt remains in full force and virtue, and the only change is in the hand entitled to receive it. This results from the general principle, that the insurers stand in the place of the assured as it regards all the rights and remedies through which an indemnity could have been obtained for the loss, which they are required to make good. *The Etna Ins. Co. v. Tyler*, 16 Wend. 385, 397; 2 Ldg. Cases in Equity, 232, 3 Am. ed., *Smith v. The Columbia Ins. Co.*, 5 Harris, 253, 260.

The law was so held in *Tyler v. The Etna Ins. Co.*, 12 Wend. 507; 16 Id. 385; *Carpenter v. The Washn. Ins. Co.*, 16 Peters, 495. And when the question arose in *The Ins. Co. v. Woodruff*, 2 Dutcher, 541, the court said that an insurance by a mortgagee was necessarily an insurance of the debt because he had no other interest, and that the insurers were entitled to be subrogated not only to the mortgage but to every other collateral by which the debt was secured.

On the other hand it has been contended with equal if not greater reason, that a mortgage is a conditional conveyance, vesting the legal

title in the mortgagee subject to the equity of redemption. He is therefore legally and for some purposes equitably an owner, and as such entitled to effect an insurance. And if he exercises this right by apt words indicating an intention to insure the building, the contract will not be interpreted by a forced construction as an insurance of the debt. *King v. The Mut. Fire Ins. Co.*, 7 Cushing, 1. Such a policy is in effect a guarantee that the property shall not be rendered less available as a security, through the operation of the perils enumerated in the policy. Payment of the loss consequently will not operate to discharge the debt on the one hand, nor will it entitle the insurers to subrogation on the other. *King v. The Mutual F. Ins. Co.*

There is still another view, intermediate between these extremes. The mortgagee is an owner, but an owner whose title can only be used as a security. The property is a fund for the payment of the debt and cannot be diverted to any other object. If he opens a quarry, fells timber, or derives a profit of any kind from the premises, the mortgagor will be entitled to a credit. And so if the buildings on the premises are taken away and sold as such, or for the materials. And when the premises are converted into money, through the operation of a policy of insurance, the money should be appropriated as the property would have been if it had not been destroyed. *The Insurance Co. v. Updegraff*, 9 Harris, 513.

The question has been considered on more than one occasion without arriving at a satisfactory conclusion. In *Irving v. Richardson*, 2 B. & Ad. 193, the defendant effected a policy of insurance in the Alliance Marine Ins. Co., for £2000, on a ship valued at £3000. He had previously insured the vessel at the same valuation with another company for £1700. The ship was lost and he received the full amount insured from both companies. The Alliance Ins. Co. were ignorant of the prior insurance when they made the payment, and on discovering the truth, brought an action in the name of the plaintiff for money had and received, to recover their proportion of £700, the excess of the sum received by the defendant over the valuation. It appeared in evidence that the defendant was interested in the ship as a mortgagee for £900 and not otherwise, but that the real value exceeded the amount received by him. Lord Tenterden, C. J., thought that the defendant was precluded by the valuation, but left it to the jury to say whether the insurance was intended only to cover the defendant's own interest as mortgagee, or that of the mortgagor also. In the latter case the defendant would be entitled to a verdict, as the sum received by him would not exceed the actual value of the interest protected by the two policies. The jury thought (and there was some evidence to warrant the conclusion) that the defendant only meant to

insure his own interest as mortgagee, and on that ground gave a verdict for the plaintiff for £286.

In refusing a new trial the court relied on the 6 Geo. 4, c. 110, sect. 45, which declares that the mortgagee of a vessel shall not be deemed the owner, except in so far as may be requisite to secure the debt. "Before the late registry act," said Littledale, J., "the mortgagee of a ship was in point of law the owner, and might insure to the full extent of the ship's value, to the mortgagor, as well as to himself. But, by the statute, the interest of mortgagor and mortgagee, are more directly severed, than they formerly were. The mortgagor now does not cease to be an owner. In order therefore that the defendant in this case might not keep possession of a sum, exceeding not only the value stated in the policies, but also the amount of his interest, it became necessary to ascertain what it was he had in reality insured; and with this view it was rightly put to the jury, whether, in effecting the policies, he intended to insure the whole interest in the vessel, or merely the amount of his own interest as mortgagee."

It is obvious that in this instance the policy was not interpreted as an insurance of the debt. A pecuniary demand for £900 could not be valued at £3000 by any process of calculation. But for the statute, the defendant would seemingly have been allowed to retain the full amount of both insurances. As it was he received and kept without objection, more than three times the sum he would have lost if the destruction of the ship had been followed by the insolvency of the mortgagor. The question whether he intended to cover the interest of the mortgagor as well as his own was left to the jury, and if it had been answered affirmatively judgment would apparently have been entered for the defendant.

In *The Ins. Co. v. Updegraff*, 9 Harris, 513, the question whether the property is insured or the debt, was in like manner said to be one of intention, although where the form of the policy shows it to be upon the house, the burden of proof is on the insurers to establish that it was designed to be a mere security for the payment of the debt; and the case of *Smith v. The Columbia Ins. Co.*, 5 Harris 353, was distinguished on the ground, that the policy was in terms to secure "a mortgage held on the above property by the assured."

A similar view was taken in *King v. The State M. F. Ins. Co.*, 7 Cushing, 11. "On principle and authority," said Shaw, C. J., "we are inclined to the opinion that when a mortgagee causes an insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before the debt is paid, he has a right to receive the total loss for his own benefit, and is not bound to account to the mortgagor for any part of the money so recovered as a part of the mortgage debt. It is not a payment in whole or in part, but he has still a right to recover his whole debt of the mortgagor. And so on the

other hand, when the debt is paid by the debtor, the money is not in law or equity the money of the insurer who has thus paid the loss, or money paid for his use. The contract of insurance with the mortgagee is not an insurance of the debt or of the payment of the debt, that would be an insurance of the solvency of the debtor; it is not broken by the non-payment of the debt nor saved by its payment."

It results from what is here said, that the insurance of a house by a mortgagee is as absolutely for his benefit as if he were the owner, and payment of the loss will neither entitle the mortgagor to a credit on the one hand, nor the insurers to subrogation on the other. *White v. Brown*, 2 Cushing, 412. On the former point the decision may be sound, but the latter is open to the objection of enabling the mortgagee to convert a contract of indemnity into a means of gain. *Kernochan v. The New York Ins. Co.*, 17 N. Y. 427, 442. If the reasoning of the chief justice is correct, a recovery may be had on such a policy for the full value of the premises, without regard to the amount of the mortgage debt, and although it has been paid since the loss by the mortgagor; or execution may conversely go against the mortgagor, although payment has already been made in full by the insurers.

Between these conflicting views it is not easy to arrive at a correct result. Obviously a policy on a house, is not, agreeably to the common use of language, an insurance of the debt which the premises have been mortgaged to secure. *Kernochan v. The New York Ins. Co.*, 17 N. Y. 428, 435. The only question therefore is whether evidence that the insured is a mortgagee or lien creditor, and not the owner, is sufficient to control the natural import of the contract. On this point the authorities, as we have seen, are diametrically at variance, but the better opinion would seem to be in accordance with *Updegraff v. The Ins. Co.*, that an insurance by a mortgagee in the ordinary form, should receive an interpretation in accordance with his position as a holder of the legal title, first to secure the debt, and next to reconvey when that is satisfied. Following this analogy, the fund arising from the payment of the loss would go in the first instance to satisfy the mortgage, and then if there was a surplus to the use of the mortgagor. In this way both difficulties would be obviated, that of a strained construction of the contract contrary to the object which the parties have in view, and that of holding the mortgagor answerable for a debt which has virtually been paid by the insurers. It may be that the mortgagor is not chargeable with the premiums paid for an insurance effected by the mortgagee; *Dobson v. Land*, 8 Hare. 216; *White v. Brown*, 2 Cushing, 412; but the argument is not conclusive, because an act which is not binding in the first instance, may become valid on ratification, (*ante*, 195).

The mere circumstance that the plaintiff is designated or insured as a mortgagee, is not enough to convert a policy on a house into an insurance of the mortgage debt, because such an insurance is entirely consistent with a design to protect the interest of the mortgagor as well as his own. *Kernochan v. The New York Bowery Ins. Co.*, 17 New York, 428. "The contract," said Strong, J., "in terms expresses that the defendants insure the plaintiff 'as mortgagee against loss or damage by fire' to the amount and on the buildings specified; and agree to make good to the plaintiff 'all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified' during one year, 'the loss to be estimated according to the true and actual value of the property.'" The loss against which the plaintiff is insured is by the very language of the contract "to the property insured;" the destruction in whole or in part of the value of the property by the total or partial burning of the property. In case of such loss it is stated that it is "to be paid within sixty days after due notice and proof thereof by the insured," in conformity to the policy. Whether the loss, by diminishing the mortgage security, endangers the collection of the debt, or the security remains ample, is not by the contract made of any importance; in either case it is insured against and the amount to be paid. Nothing is said in the policy in regard to the mortgage debt, nor is any allusion made to it further than by the statement that the plaintiff is insured as mortgagee. I think it apparent therefore, on the face of the policy, that the contract is in its nature an insurance of the property mortgaged, and not of the debt of the plaintiff. The debt is important as the source of the plaintiff's interest in the property; without an interest in the property the policy would be invalid, and the insurance is limited to that interest. The insurance thus has respect to the debt; the mortgage lien is the basis and extent of the right of the plaintiff to insure; but the insurance is upon the property, the subject of the lien.

When, however, the policy is in terms on the interest of the insured as mortgagee, or contains a recital that it is intended to secure a mortgage held by him, there can be no doubt that the contract relates to the debt and not to the building, and the insurers will be entitled to subrogation on payment. *Smith v. The Columbia Ins. Co.*, 5 Harris, 253.

It seems to be generally conceded that the mortgagee may, when such is his intention, protect the interest of the mortgagor as well as his own. This is implied by the language of Story in the case of *Carpenter v. The Ins. Co.* (post); and was expressly declared in *The Ins. Co. v. Undergraff*. The difficulty is to know what inference should be drawn from a policy in the ordinary form, where there is no extrinsic evidence. On this head the courts of Massachusetts agree with *Carpenter v. The Wash. Ins. Co.*, that such an insurance is exclusively on

the interest and for the use of the mortgagee, and that no benefit can arise out of it to the mortgagor. *King v. The State M. F. Ins. Co.*, 7 Cush. 1, 8 (ante, 827). In *King v. The Ins. Co.*, Shaw, C. J., said that there was no rule of law or morals which precluded the mortgagee from recovering and holding both sums; that due by the mortgagor for the debt, and that arising under the policy from the loss. It was not a case of a double satisfaction. The demands were distinct and arose on different contracts. Nor was the policy as thus construed objectionable as a wager, because such was not the design, and if the effect was to enable the insured to recover a compensation where there was no loss, this was a fortuitous result not contemplated by the parties. The same rule prevails in Maine. *The Concord M. F. Ins. Co. v. Woodbury*, 45 Maine, 447; *Fox v. The Phoenix Ins. Co.*, 52 Id. 333.

As the insurable interest of the mortgagee is derived from the debt, it will cease on payment and he cannot recover for a subsequent loss; *King v. The State Fire Ins. Co.*, 7 Cushing 1, 5; *Carpenter v. The Wash. Ins. Co.*, 16 Peters, 495; unless the insurance is for the benefit of the mortgagor as well as his own. The same result will follow *prima facie* from an assignment of the mortgage, or of the debt which it was given to secure. See *The New England Ins. Co. v. Wetmore*, 32 Ill. 221.

The position of an unpaid vendor is analogous to that of a mortgagee. Whether he retains the legal title, or conveys it and takes a purchase money mortgage, he is equally a creditor with a right of recourse to the land. But while this is his relation to the purchaser, he has relatively to third persons many of the rights and remedies of an owner. A policy in his name may therefore be regarded either as an insurance of the premises or of the amount due by the vendee. The latter view was taken in *The Aetna Ins. Co. v. Tyler*, 12 Wend. 507; 16 Id. 385; although the point was not directly before the court. When, however, the question arose in *Updergraff v. The Ins. Co.*, 9 Harris, 513, a critical examination of the subject led to the opposite inference, that a vendor who has not conveyed, may, by virtue of the legal title and his former ownership insure the building, and that if he does, the policy will not be interpreted as an insurance of the debt contrary to the natural import of the language. *Reed v. Lukens*, 8 Wright, 200; *The Wheeling F. & M. Ins. Co. v. Morrison*, 11 Leigh, 354. The question is one of fact rather than law, depending on the intention of the parties as disclosed by the policy when read in the light of the extrinsic evidence; and if that was to insure the building, there is no reason why it should not take effect. "Although," said Lewis, C. J., in *The Ins. Co. v. Updegraff*, "the vendor is not bound to insure, or even to continue an insurance already made, he may, like any other trustee having the legal title, insure if he thinks proper, to

the full value of the property. 1 Arnould, 259; 2 B. & P. N. R. 324. It is true, that in the case of a mortgagee of a ship, he can only recover to the extent of his mortgage debt, unless it appears that in effecting the insurance he intended to cover, not his own interest only, but that of the mortgagor also. 2 B. & Ad. 193; 1 Moody & Rob. 153. If he intended to cover the whole interest, both legal and equitable, he may recover the whole amount of the insurance, under a trust, as to the surplus, to hold it for the mortgagor. *Carothers v. Shedden*, 6 Taunt. 17; 1 Arnould, 252. The same rule applies to the case of an insurance by a vendor. There is this difference, however, that as the whole estate is at law in the vendor, and the vendee has only a title to go into equity, the insurance company cannot assert the rights of the latter, or go into equity in respect to them, except upon principles of equity and good conscience. An insurance upon a house, effected by the vendor, is *prima facie* an insurance upon the whole legal and equitable estate, and not upon the balance of the purchase money. Where the form of the policy shows it to be upon the house, and not upon the debt secured by it, the burthen of showing that the insurance was upon the latter and not upon the former, rests upon the underwriters. There is no hardship in this. The premium paid, as compared with that usually charged where the insurance is upon houses, and not upon debts secured by them, is generally decisive of the question, and the rates of insurance are peculiarly within the knowledge of the insurance company. If the insurance was upon the whole estate, the premium would be according to the usual rates for houses of that description and location; if it was only upon the debt due to the vendor, there would be a large reduction, on account of the responsibility of the vendee and the value of the lot of ground included in the sale, because both of these would, in that case, stand as indemnities to the underwriters. They would be entitled to a cession of the vendor's claims, from which an ample indemnity might be recovered. If the lot was worth the balance of the purchase money, there would be no risk whatever, and the premium would be quite insignificant. If the intention was to insure only the debt due to the vendor, and a full premium was charged, without deduction for the securities which the underwriters knew he held, a portion of the premium should have been returned, upon the principles which require a return of premium for short interest, for over insurance, and for double insurance. 11 Pick. 85; 1 Met. 16; 2 Arn. 1226.

“But there was no evidence tending to prove that the premium was less than the usual rates for houses of the description set forth in the policy, where the whole estate is insured. Nor was there any offer to return any portion of the premium. On the contrary, all the evidence tended to show that the insurance company was fairly informed of all the ma-

terial facts—that its agent advised the insurance to be taken in the name of the vendor, because the latter were ‘the legal owners,’ and that the vendor replied that he had no ‘objection to sign the premium note.’ Unless the intention was to cover both interests, there was no ground for question, or for taking or giving advice in regard to which name should be used, or for the vendor’s consideration whether he had or had not any objection to signing the premium note.

“The instrument before us is an open policy of limited extent. The underwriters agree to make good to the insured, not all his loss, but all such loss or damage, not exceeding the sum stated, as shall happen by fire to the property—the loss or damage to be estimated, not according to the balance of the purchase money which may remain unpaid at the time of damage, nor according to the probabilities of recovering such balance from the vendee, or from the lot, but ‘according to the true and actual value of the said property.’ The policy is in form an insurance upon the house, and not upon the debt; and no evidence whatever was given to change its character, or to show that anything more or less was intended by the parties. It follows that the plaintiff below was entitled to recover, under a trust, as to the surplus, for the benefit of the vendee. The underwriters have shown no equitable right to intermeddle between the vendor and the vendee. Under such circumstances they must be content to respond to the party with whom they made the contract of insurance.”

This decision was cited and followed in *Reed v. Lukens*, and a purchaser under an executory contract of sale, said to be entitled to the full amount of an insurance effected by the vendor.

It seems to be generally conceded, that an insurance by a mortgagor or vendee is *prima facie* limited to his own interest, and will not confer a distinct or independent right on the mortgagee or vendor. *Carpenter v. The Washington Ins. Co.*, 16 Peters, 495 (post); *Carter v. Rockett*, 8 Paige, 437. This is true even when the loss is under the terms of the policy, payable to the mortgagee, which operates as an equitable appropriation of the amount which will become due in the event of loss to the mortgagor, without varying the operation of the policy or rendering it an insurance of the interest of the mortgagee. *Grosvenor v. The Atlantic Fire Ins. Co.*, 17 New York, 391; *Macomber v. The Cambridge M. F. Ins. Co.*, 8 Cushing, 133; *Foster v. The Equitable Fire Ins. Co.*, 2 Gray, 216; *Carpenter v. The Washington Ins. Co.*

Whatever the rule may be under ordinary circumstances, it is clear that if the mortgagee or vendor agrees, although only by parol, to keep the premises insured for the protection of the mortgagor or vendee a subsequent insurance will be presumed to have been effected in pursuance of this obligation, although not expressed in the policy. *Kernochan v. The New York Bowery F. Ins. Co.*, 17, N. Y. 428; *Benjamin*



v. *The Saratoga M. F. Ins. Co.*, 1b. 415; and a similar inference may be drawn from proof, that the mortgagor paid the premium. *Millenberger v. Beacon*, 5 Barr, 198; *Kernochan v. The Insurance Co.* This does not conflict with the rule which excludes parol evidence where a writing is in question, because the policy, while describing the property, is silent as it regards the nature and extent of the interest; *Smith v. The Columbia Ins. Co.*, 5 Harris, 253, 260; and the question whether the building is insured or the debt, is a latent ambiguity which does not appear on the face of the instrument.

The principle is the same when it is agreed that an existing policy shall be kept open for the benefit of the purchaser, and assigned to him when the deed is executed. *The F. & M. Ins. Co. v. Morrison*, 11 Leigh, 354; *Shotwell v. The Jefferson Ins. Co.*, 5 Bosworth, 247. The consent of the insurers is, however, requisite to the transfer of an insurance against fire, and when it is not given, a covenant to assign, will be as inoperative as a formal transfer. The parties to the sale cannot by any agreement between themselves evade this principle, or render a policy effected by the vendor before the sale, an insurance for the purchaser. Notwithstanding any such stipulation the policy will continue to be what it was originally, an insurance of the vendor's interest; and if that is reduced by sale to the unpaid balance of the purchase money, the vendee will not be entitled to any other or greater sum. *Shotwell v. The Jefferson Ins. Co.*, 5 Bosworth, 247.

In *Shotwell v. The Jefferson Ins. Co.*, the plaintiff effected an insurance on his real estate, with a proviso that the premises should not be alienated, or the policy assigned without the consent of the insurers. He subsequently sold the house and covenanted to keep it insured for the benefit of the vendee. The latter went into possession, and paid, the purchase money except the last instalment of \$1,500. It was held under these circumstances that the policy was not avoided by the sale. The vendor might recover to the extent of his insurable interest, or in other words, so far as he was prejudiced by the loss. The judgment must, however, be limited to the amount due under the contract of sale. There could be no recovery under the policy for the injury sustained by the vendee. In this regard it made no difference that the vendor had covenanted to keep the premises insured for the benefit of the purchaser. This stipulation operated as an equitable assignment of any demand that might accrue in his own right; but did not confer an independent right on the covenantee. The consent of the insurers was requisite to the transfer of the policy as an insurance, it was not requisite to the transfer of the policy as a demand. It followed that the insurers were not entitled to subrogation to the lien for the unpaid purchase money. If such a right would have arisen under other circumstances, it was precluded by the covenant, which operated as an implied

assignment entitling the vendee to have the fund applied to the extinguishment of the unpaid balance of the purchase money.

In like manner, a covenant by the mortgagor or vendee to insure for the benefit of the mortgagee or vendor, will operate as an equitable assignment, entitling the covenantee to have the fund arising from the loss appropriated to the payment of the purchase money in the one case, and the mortgage debt in the other. *Caswell v. The Brooklyn F. Ins. Co.* 39 Barb. 228; *Carter v. Rockett*, 8 Paige, 437; *Nichols v. Baxter*, 5 Rhode Island, 491; *Thomas' Administrators v. Van Kaff's Executors*, 6 Gill & J. 372. Such a covenant operates as an equitable lien or charge upon the fund which may be enforced in equity or through an action for money had and received; and the same result will follow from a provision in the policy that the loss shall be payable to the mortgagee. *Carpenter v. The Washington Ins. Co.*, 16 Peters, 495 (post); *Molloy v. The Manufacturers' Ins. Co.*, 29 Maine, 337; *Tillou v. The Merchants' M. Ins. Co.*, 9 Barbour, 590.

The party claiming under such a lien will, however, stand in the shoes of the person under whose covenant or stipulation it originates, and can recover nothing that would not have been due to him. *Carpenter v. The Washington Ins. Co.*

"A contract of insurance against fire," said Chancellor Walworth, in *Carter v. Rockett*, "as a general rule, is a mere personal contract between the assured and the underwriters, to indemnify the former against the loss he may sustain. But the assured, by an agreement to insure for the protection and indemnity of another person, having an interest in the subject of insurance, may unquestionably give such third person an equitable lien upon the money due upon the policy, to the extent of such interest. Thus, in the case of *Thomas' Ex'rs v. Van Kaff's Ex'rs*, 6 Gill & John. Rep. 372, where the mortgagor covenanted with the mortgagee that he would keep the premises insured during the continuance of the lien of the mortgage, and in case of loss, that the amount received upon the policy should be applied to the rebuilding of the property insured, the Court of Chancery, in Maryland, decided, that the mortgagee had an equitable lien upon the fund received by the mortgagor under the policy, to satisfy the balance due upon the mortgage which could not be collected upon a foreclosure and sale of the mortgaged premises. A similar decision was made by the Court of King's Bench, in England, in the case of *Vernon v. Smith*, 5 Barnwell & Alderson, Rep. 1, where the lessee of premises, to which the 83d section of the building act, 14 Geo. III., chap. 78, was applicable, covenanted with the lessor to keep the premises insured. But a mere lien on the property insured, does not give to the holder of that lien a corresponding claim upon the policy which the owner of the goods has obtained for the protection of his own interest therein; although the

assured is personally liable to pay the debt, which is a lien upon the property insured. *Neale v. Reid*, 3 Dowling & Ryland, 158; Beaumont on Fire and Life Insurance, 77. Here the defendant, Rockett, is personally liable for the payment of \$5,000 on one of the mortgages upon the premises; but as there was no agreement, either express or implied, that he would cause the premises to be insured for the protection of the rights of the complainant, or of his assignee, they have no better claim than any other creditor of Rockett, to the fund which is due to him from the insurance company."

When, however, the insurers agreed to renew the policy in answer to a letter from the plaintiff, informing them that he had entered into an executory contract of sale, the insurance was said to extend to the whole value of the property without regard to the state of the accounts between the vendor and the vendee. *Benjamin v. The Saratoga Ins. Co.*, 17 New York, 414. So a policy effected by a vendor in pursuance of a covenant with the purchaser, gives rise to a trust in favor of the latter which will not be invalidated by the failure of the vendor's interest through the payment of the price. And the language held in *Reed v. Lukens*, 8 Wright, 209, and *The Wheeling Ins. Co. v. Morrison*, 11 Leigh, 354, would seem to imply that the effect of a sale in reducing the insurable interest of the vendor under a prior policy to the amount due and unpaid by the vendee, may be obviated by an agreement to keep the insurance open for the benefit of the latter, but the point was not actually before the court in either instance.

The payment of an actual or constructive total loss, operates in many respects as a purchase, entitling the insurers to an assignment of all the right, title and interest of the insured in and to the property destroyed, including the *spes recuperandi* from any other source; together with the remedies and collateral securities which might have been directly or indirectly enforced as a means of indemnity, if satisfaction had not been obtained from them. *Randall v. Cochran*, 1 Vesey, 98; *Comegys v. Vasse*, 1 Peters, 193, 215; *Woodruff v. The Ins. Co.*, 2 Dutcher, 147; 2 Leading Cases in Equity, 232, 3 Am. ed.; *The Atlantic Ins. Co. v. Storrow*, 5 Paige, 285, 294.

An action may consequently be brought in the name of the owner for the use of the insurers, against the county or hundred to recover damages for an injury occasioned by incendiarism or the violence of a mob; *Mason v. Sainsbury*, 3 Douglass, 61; *Clark v. Blythe*, 2 B. & C. 254; and for the same reason a carrier will be responsible to the insurer for the loss of the goods entrusted to him for transportation, whenever the circumstances are such that he could have been held accountable by the insured. *The Atlantic Insurance Co. v. Storrow*; *Smith v. Scott*, 4 Taunton, 126; *Steele v. The Franklin Ins. Co.*, 5 Harris, 290; *The Mercantile M Ins Co., v. Cables*, 20 New York, 173.

Subrogation will in like manner be enforced where the destruction of the property at risk is occasioned by sparks from the flue of a steamer or locomotive. *Hart v. The Western R. R.*, 13 Metcalf, 105; *Trask v. The Hartford & New Haven R. R.*, 2 Allen, 331; *The Quebec F. Ins. Co. v. St. Louis*, 7 Moore, P. C. C. 280. And if the remedy of the insurers is frustrated in any such case by the act of the insured in compounding with or discharging the persons who are primarily liable for the injury, it will be a defence wholly or *pro tanto* to an action on the policy of insurance. *Atlantic Ins. Co. v. Storrow*.

The insurers are equitable assignees for value, and a release from the owner of the property at risk will not be a defence to a suit brought in his name for their benefit. *Hart v. The Western R. R.*, 13 Metcalf, 105; 2 Leading Cases in Equity, 376, 3 Am. ed.

Whether an insurance by a mortgagee or unpaid vendor falls within this doctrine, is a question which does not admit of an answer applicable to every case. *Kernochan v. The Ins. Co.*, 17 New York, 428, 441. When the insurance is exclusively for the benefit of the vendor as a lien creditor, the payment of the loss entitles the insurers to an assignment of his interest including the mortgage and all collaterals by which it is secured. *Smith v. The Columbia Ins. Co.*, 5 Harris, 253. When, however, the vendor insures for the benefit of those claiming under him as purchasers, there can be no right to subrogation, because it would defeat the object for which the policy was taken out. The inquiry depends on two subordinate questions: Is a policy in the name of a vendor *prima facie* an insurance of the debt or of the building? Will a policy in his name enure for the benefit of a vendee who is not named in the policy? The considerations bearing on the former point have been already stated, (ante, 825); as it regards the latter the general rule would seem to be that a policy in the name of one man cannot take effect for the benefit of another, unless it contains the words "for whom it may concern," or some other equivalent expression. *Barker v. The Marine Ins. Co.*, 2 Mason, 369; *Graves v. The Boston M. Ins. Co.*, 2 Cranch 419; *Sawyer v. Mayhew*, 51 Maine, 398; *The Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72. A trustee or other holder of the legal title may, however, generally insure in his own name for the protection of the beneficial interest. *Lucena v. Crawford*, 3 Bos. & Pul. 75; *Buck v. The Chesapeake Ins. Co.*, 1 Peters, 171; *The Ins. Co. v. Chase*, 5 Wallace, 509; *De Forrest v. The Fulton Ins. Co.*, 1 Hall, 84, 104, 115; and a vendor is, agreeably to the decisions in Pennsylvania, within this principle. *Updegraff v. The Ins. Co.*, 9 Harris, 513, (ante, 830); *Reed v. Lukens*, 8 Wright, 200. And as the position of a mortgagee is closely analogous to that of a vendor who retains the title as a security for the price, if the right of subrogation is denied in the latter case, it should

not be allowed in the former. *Kernochan v. The New York Bowery Ins. Co.*, 17 New York, 428.

A different view was, however, taken in *Tyler v. The Ætna Ins. Co.*, 12 Wend. 512; 16 Id. 385; under which payment of the loss under an insurance by a vendor, will entitle the insurers to subrogation, if not necessarily, at least *prima facie*, and unless the policy is shown to have been effected for the protection of the vendee.

The following language was held on this point by Chancellor Walworth, in the Court of Errors: "If the assured sells the property, and parts with all his interest therein before the loss happens, there is an end of the policy, unless it is assigned to the purchaser with the assent of the company; or, if he retains but a partial interest in the property, it will only protect such insurable interest as he had in the property at the time of the loss. In the present case, all the insurable interest which Shafer had in the property after his sale to Tyler, was the amount of his unpaid purchase money, so far as the land upon which the house stood was insufficient to protect him from loss; and provided that the purchaser was unable to pay the same.

"Even a recovery by Shafer from the other company, would not protect Tyler from any part of the loss sustained by the destruction of the building, as he would still be liable for the whole amount of the purchase money. Shafer, indeed, could not recover that money and retain it for his own benefit, after he had been paid by his underwriters; but it could be collected in his name, for the benefit of such underwriters, as they are in equity entitled to all his rights and remedies, if they pay the amount of his loss. This principle of equitable subrogation, or substitution of the underwriters in the place of the assured, is recognized by every writer on the subject of insurance, and is constantly acted upon in courts of law, as well as in equity; so that, where the assured has a claim to indemnity for his loss against a third person, who is primarily liable for the same, if the assured discharges such third person from his liability before the payment of the loss by the underwriters, he discharges his claim against them for such loss, *pro tanto*. Or, if he obtains payment from such third person afterwards, it is in the nature of salvage, which he holds as trustee for the underwriter, who has paid his loss. Thus, in the case of *Garvie v. The New York Ins. Co.*, 8 Johns. R. 246, where the assured recovered to the full amount of the policy, upon a condemnation of the vessel and cargo under the Berlin and Milan decrees, although there was no abandonment of the *spes recuperandi* against the French government, Chief Justice Kent says, that 'If France should at any time hereafter make compensation for the capture and condemnation, the United States, upon the receipt of the money, would hold it as a trustee for the party having the equitable interest therein; and that would clearly be the underwriter.' So.

in the case of *Goodsall v. Boldero*, 9 East, R. 72, which was the case of an insurance by a creditor upon the life of Mr. Pitt, the British minister, who died insolvent, and the government afterwards granted a sum of money to the executors to pay the debts, the Court of King's Bench held that the underwriters were entitled to the benefit of the payment made to the creditors by the executors, although there was an actual total loss before the grant by the government to pay the late premier's debts. So, in the case of *Mason v. Sainsbury*, 3 Douglass, 61 ; 2 Condry's Marsh. 794 ; and which is recognized as good law, in the recent case of *Clark v. The Inhabitants of Blything*, in the Court of King's Bench, where the assured, who had received his whole demand from the underwriter for the loss sustained by a fire, was permitted to recover the same from the inhabitants of the hundred, who were also liable to him upon the statute : or rather, the underwriters were permitted to recover the same in his name, the suit being prosecuted for their benefit. The same principle, as to the equitable right of the insurer to be subrogated to all the rights and remedies of the assured to obtain compensation for his loss from other persons, was acted upon by the vice-chancellor of the first circuit, in the recent case of *The Atlantic Ins. Co. v. Storrow and others*, where an attempt was made by the master and owners of the vessel, who were primarily liable for a loss of goods by thieves, to throw the loss upon the underwriters, and to deprive them of their remedy over against those who were liable to the assured to make good his loss ; and the decision of the vice-chancellor in that case was affirmed upon appeal ; see 5 Paige's R. 285. The rule on this subject is thus correctly laid down by Phillips, in his valuable Treatise on the Law of Insurance, which has become a text book in the American courts : 'Where the insurable interest consists of a debt due to the assured, as in the case of advance by consignee, or a policy on the life of the debtor, the assured is bound, no doubt, to assign to the underwriter his debt, or his insurable interest, whatever it may be, in case of his being paid a total loss.' 2 Phillips on Insurance, 282. It is evident, therefore, in the case under consideration, that the two insurances after the sale, and when the last insurance was made, were upon two distinct and separate interests. The subject matters thereof were different ; the one being upon Tyler's debt to Shafer, which might be lost by the destruction of the house, if the vendee was unable to pay ; and the other upon the actual loss of the house. The loss of the house must fall upon the holder of the last policy, in any event, as the underwriters in the first policy will be entitled to an assignment of Tyler's contract to pay the purchase money, and may collect the full amount thereof from him, if they shall pay to Shafer the full amount of his debt."

The case of *The Ins. Co. v. Updegraff* is, however, sustained by the recent decisions in New York, which establish that a vendor or mort-

gagee may by virtue of his position as a holder of the legal title, insure in his own name for the protection of the persons who are beneficially interested in the equity of redemption, or as purchasers, and that under these circumstances no right of subrogation will accrue to the insurers. *Benjamin v. The Saratoga M. F. Ins. Co.*, 17 New York, 414; *Kernochan v. The New York Bowery Ins. Co.*, Ib. 428.

The insurers are not entitled to subrogation under the authorities in Massachusetts, even when the mortgagee insures exclusively for his own benefit; *King v. State Ins. Co.*, 7 Cushing 1; *Foster v. The Equitable Ins. Co.*, 2 Gray, 216; *The Suffolk Fire Ins. Co. v. Boyden*, 9 Allen, 123; and the decisions in Maine are to the same effect. The question arose in *The Suffolk Ins. Co. v. Boyden*, upon a bill filed by the complainants who had insured the respondent specifically as a mortgagee, offering to pay the amount of the loss, and the amount due on the mortgage in excess of the loss, and praying to have the mortgage assigned to them, and generally for subrogation to the rights and remedies of the mortgagee. Hoar, J., said that the only distinction between the case at bar, and *King v. The State Fire Ins. Co.*, was that one was a suit in equity, and the other at law, and that the insurance in the case before the court was made expressly on the interest of the assured as mortgagee, instead of being generally on the building, without disclosing the nature of his interest. The court were, however, of opinion that an insurance by a mortgagee was not an insurance of the debt, although the amount of the debt was the measure of his insurable interest in the property. The mortgagor could derive no benefit from the insurance in case of loss, and the argument was at least as strong against the right of the insurers to subrogation. The bill must therefore be dismissed with costs.

Subrogation is an equity depending on all the circumstances of the case, and the party claiming it cannot go beyond the right of the creditor, whose place he takes. When, therefore, the carrier is by the provisions of the bill of lading, exempt from liability, the insurers cannot proceed for an injury occurring while the goods were in his possession, unless it originated from his negligence, and the same result will follow where it is agreed that he is to have the benefit of any insurance that may be effected by the owner of the goods. *Mercantile M. Ins. Co. v. Calebs*, 20 New York, 173. In like manner, a covenant by a mortgagee or vendor, to keep the premises insured for the benefit of the purchaser or mortgagor, operates as an equitable transfer or assignment of the fund arising from the loss, and will be a sufficient answer to a claim for subrogation on the part of the insurers. *Carnochan v. The New York Bowery F. Ins. Co.*, 17 New York, 428; *Benjamin v. The Saratoga M. F. Ins. Co.*, Ib. 414; *Shotwell v. Jefferson Ins. Co.*, 5 Bosworth, 247. In *Carnochan v. The New York Bowery Ins. Co.*, Strong, J., said,

“that the utmost the insurance company could claim was to be subrogated to the right of the mortgagee to collect the debt. Such a right obviously could not exist, unless the payment of the loss operated as a purchase of the mortgage. And as the amount of the loss, was by, the terms of the contract, to go in satisfaction of the mortgage, this equity must yield to the superior right of the mortgagor.” It is obvious however, that as the equity of the insurers grows out of their position as sureties or guarantors, it cannot be prejudiced by any agreement which is concealed from them or to which they do not assent. *Storrow v. The Atlantic Ins. Co.*, 5 Paige, 285 (ante, 407).

A person having no beneficial interest may be entitled to insure as the representative of others in whom the right of ownership is vested. *Goodall v. The New England Ins. Co.*, 5 Foster, 169, 186; *DeForest v. The Fulton Fire Ins. Co.*, 1 Hall, 84. A trustee may consequently effect an insurance in his own name; and so may an executor, or a consignee or factor, although not in advance to the principal or consignor. *Morris v. The Insurance Co.*, 5 Harris; *De Forest v. The Fulton Fire Ins. Co.*, 1 Hall, 84. There is a common ground in all these instances. Agreeably to the strict rule of the common law, the ownership is in the holder of the legal title; *The Insurance Co. v. Updegraff*, 9 Harris, 513; And there is no equitable principle on which the insurers can ask to be relieved from a contract for which they have received a full equivalent. If chancery intervenes, it will not be to exonerate them, but to direct that the proceeds shall be appropriated to the use of the persons who are beneficially interested in the property at risk. This equity was *prima facie* to the whole, but it may be repelled by proof that the trustee is entitled to reimbursement for charges and advances, or in the case of a vendor, that he has a lien for the price. *The Insurance Co. v. Chase*, 5 Wallace, 509; *Philips v. The Gebhard Ins. Co.*, 9 Bosworth, 405; *White v. The Hudson River Ins. Co.*, 7 Howard, New York, 341; *The Insurance Co. v. Updegraff*.

In *The Insurance Co. v. Chase*, 5 Wallace, 509, Davis, J, said, “that a trustee having no personal interest in the property might procure an insurance upon it, was a doctrine too well settled to need a citation of authorities. As early as 1802, the judges of the Exchequer Chamber, in the case of *Lucena v. Crawford*, held that an agent, consignee, or trustee could insure, and that it was not necessary that the assured should have a beneficial interest in the property, and the rule established by this case had ever since been followed by the courts of this country and in England.” An insurance by one of five trustees in his own name, but with the tacit consent of the others, was held to be valid under this principle, and it was said that even if he acted without authority, the policy was still a binding contract which the underwriter could not dispute if the co-trustees ratified it.



The principle is the same whether the trust is express, or results from the relation between the parties. *Waters v. The Monarch Fire Ins. Co.*, 5 Ellis & Bl. 870, 880. If a mortgagee or vendor is not a trustee for the mortgagor or purchaser under ordinary circumstances, he may acquire that character by stipulating to insure for his benefit or effecting an insurance with money received from him (*ante*, 835). *Benjamin v. The Saratoga M. F. Ins. Co.*, Id. 414; *Kernochan v. The Insurance Co.*, 17 New York, 428. In like manner a covenant by the mortgagor or purchaser to insure, will operate as an equitable appropriation to the use of the vendor or mortgagee. And so when the policy is assigned to the mortgagee as collateral security, he will hold it in trust first to pay the debt, and then if there be a surplus for the mortgagor. *Smith v. Packard*, 15 New Hampshire, 575.

An executor or administrator may insure the chattels of the testator as the holder of the legal title, and in his fiduciary capacity as representing the legatees, distributees and creditors. And when the personal estate is inadequate, or the land is primarily liable under the terms of the will, he may have an insurable interest in the real estate. *Phillips v. The Gebhard Ins. Co.*, 9 Bosworth, 404; *Herkimer v. Rice*, 27 New York, 163; *Colburn v. Lansing*, 46 Barb. 37. An executor may also have an insurable interest in a building which he has purchased for the widow of the testator in pursuance of his directions, because the destruction of the building will involve a further charge on the personal estate. *Colburn v. Lansing*, 47 Barb. 37.

When a building which has been insured by the owner is destroyed by fire after his death, the right of action for the loss vests in his personal representatives, in trust for the heirs, devisees, creditors and other persons claiming under him by gift, contract or descent. *Wyman v. Prosser*, 36 Barb. 368; *Wyman v. Wyman*, 26 New York, 253. The administration of the fund belongs appropriately to a court of equity which will direct that it be held in trust first to pay the judgment and other lien creditors of the deceased, and next for the persons claiming under him by descent or devise as tenants for life, reversioners or remainder men. *Parry v. Ashley*, 3 Simons, 97; *Haxall v. Shippen*, 10 Leigh, 536; *Wyman v. Wyman*, 26 New York, 253; *Graham v. Roberts*, 8 Iredell, Eq. 99; *Campbell v. Murphy*, 2 Jones Eq. 337. The fund is, however, relatively to every claim originating after the loss, money and not land, and will consequently go to the executors of a devisee, not to his heir. *Haxall v. Shippen*, 10 Leigh, 636. For a like reason, a tenant for life cannot use it to rebuild the premises without the consent of the remaindermen; *Haxall v. Shippen*; nor will such an appropriation be directed at the instance of a reversioner against the wishes of the tenant for life. In *Haxall v. Shippen*, the testator devised a dwelling house to his wife for life, remainder to his

daughters. He also effected an insurance "for himself and his heirs." The premises were destroyed by fire after his death, and the loss paid to the widow, who employed the money in rebuilding the house. She died, and her personal representatives were held liable to the devisees in remainder and their husbands who were parties to the bill, for the whole amount of the insurance money, without any abatement for the benefit which they had received indirectly from the restoration of the building.

If such be the rule in the case of a total loss, the interest of all parties obviously requires when the loss is merely partial, that the premises should not remain in a ruinous or dilapidated condition, and equity may then require that the fund should be used to restore the building. *Higgins v. Brough*, 2 Grattan, 408. A similar equity may arise under other circumstances, and when a house which had been charged by the testator with an annuity, was consumed after his death, the court directed the insurance money to be employed in rebuilding the premises. *Perry v. Ashly*, 3 Simons, 97. In general, the fund arising under an insurance effected by a tenant for life, belongs to his personal representatives and not to the remainderman, although the result may be different when the fund is specifically appropriated or set apart for the benefit of the inheritance. *Norris v. Harrison*, 2 Maddock, 268; see *Harall v. Shippen*, 10 Leigh. 636.

It may be inferred from the language of Lord Eldon in *Lucena v. Crawford*, 3 Bos. & Pul. 75; 2 New Reports, 269, 324, that an agent, bailee or consignee who has a bare possession without title or a qualified right of property, cannot effect an insurance in his own name; although he may insure in that of the principal or generally for whom it may concern; (see *De Forest v. The Fulton Ins. Co.*, 1 Hall, 84; 1 Arnould on Insurance, 246;) and this is equally true of the master of the vessel, who is the mere servant of the owners. When, however, the bill of lading is endorsed to the consignee or supercargo (*Buck v. The Chesapeake Ins. Co.*, 1 Peters, 151), or made out in his favor, he may no doubt insure as the holder of the legal title; and the same result will follow when the goods are consigned to him for sale, which implies that he is to exercise a right of dominion or ownership; *Lucena v. Crawford*; *De Forest v. The Fulton F. Ins. Co.*, 1 Hall, 84, 107; and the reason of the thing is the same when a factor or commission merchant holds the goods of his principal with a power to sell. *De Fores v. The Fulton F. Ins. Co.*

It would, moreover, appear that possession, subject to the duty of accounting to the owner, will confer an interest which may be made the subject of an insurance. *Marks v. Hamilton*, 7 Exchequer, 323. The right of warehousemen, carriers and forwarders to insure, may be referred to this head, and would seemingly exist if the freight and charges were

paid in advance, and the carrier was not legally responsible for the loss. *Waters v. The Monarch Ins. Co.*, 5 Ellis & Bl. 870; *The London & Northwestern R. R. Co. v. Glynn*, 1 Ellis & Ellis, 651.

In *Siter v. Morrs*, 1 Harris, 218, the defendants, who were commission merchants and forwarders, had effected an insurance on merchandise, "generally their own or held in trust or on consignment." Goods were sent to them subsequently by the plaintiff for safe keeping, and deposited in their warehouse. A fire occurred which destroyed the building with its contents, and the plaintiff was held to be entitled to a due proportion of the amount received from the insurers.

In these instances the intention to insure generally for the benefit of the principal appeared from the terms of the policy, but it may, when the instrument is silent on this point, or uses ambiguous language, be shown by extrinsic evidence. *Crowley v. Cohen*, 3 B. & Ad. 478; *Updegraff v. The Insurance Co.*, 9 Harris, 513. On the other hand an insurance by a commission merchant "in trust," may be restricted to his own interest, by proof of his declarations at the time of making the contract. *Parker v. The General Ins. Co.*, 5 Pick. 34.

It may be conceded that a naked bailment, determinable at pleasure, will not confer an insurable interest. The bailee may have an implied authority to insure, but if the policy is not in the name of the principal, it must contain appropriate words, indicating that the agent is acting on behalf of others, and not exclusively for his own benefit. *De Forest v. The Fulton Ins. Co.*, 1 Hall, 84, 107; *Finney v. The Bedford Fire Ins. Co.*, 8 Metcalf, 348; *Wise v. The Marine Fire Ins. Co.*, 23 Missouri, 88, (ante, 836). When, however, an implied authority to insure for the benefit of another, is coupled with a special or qualified right of property in the bailee or agent, both may be brought within the compass of the same instrument, and covered by general words of insurance. A consignee, a wharfinger, a warehouseman, or a common carrier who has a lien for freight or charges, may consequently effect an insurance in his own name, which will protect the property of the consignor or owner. *Savage v. The Corn Exchange Ins. Co.*, 4 Bosworth, 1; *Crowley v. Cohen*, 3 B. & Ad. 478; and so may a master to whom the goods on board are consigned for sale. *Buck v. The Chesapeake Ins. Co.*, 1 Peters, 151. The recent cases in England and the United States, indicate that the possession of chattels, coupled with a responsibility for them to the owner, is an insurable interest. *Marks v. Hamilton*, 7 Exchequer, 323; *Waters v. The Monarch Ins. Co.*, 5 Ellis & Bl. 870. And in *Waters v. The Assurance Co.*, Lord Campbell said that a person who is intrusted with goods can insure without orders from the owner, and even without informing him that there is such a policy, and the case of *Siter v. Morrs*, 1 Harris, 218, goes nearly if not quite to that extent.

It has been held for a like reason that the superintendent of a manufacturing company may, on making a full disclosure to the insurers, cover the buildings and machinery of his principals by a policy in his own name. The right of a consignee to insure was affirmed without qualification in *Crawford v. Hunter*, 1 Term 13, and by the judges in *Lucena v. Crawford*; and the opinion of Lord Eldon, which led to a reversal of that decision in the House of Lords, seems to have been founded on the peculiar position of the plaintiffs, as commissioners under the crown, and does not apply to an agent who has the custody, possession or control of the property which he insures.

There is, however, a marked distinction between an authority to insure and an insurable interest, and either may be valid in the absence of the other. *Plahto v. The M. & M. Ins. Co.*, 38 Missouri, 248. The doctrine that a written contract may take effect in favor of an undisclosed principal (see *Beckham v. Drake*, 9 M. & W. 79; 11 Id. 315; 2 House of Lords' Cases, 579 (ante,) vol. 1, notes to *Rathbone v. Budlong*) applies to a policy of insurance; and an agent may consequently protect the property of his principal by an insurance in his own name, but declared to be in trust or for whom it may concern. *Newsom v. Douglass*, 7 Harris & J. 451; *Fowler v. The Atlantic Ins. Co.*, 8 Bosworth, 332; *The Protection Ins. Co. v. Wilson*, 6 Ohio N. S. 553. And the final result of the case of *Lucena v. Crawford*, which ended in a verdict for the plaintiffs, on proof that the act had been adopted by the crown, established what the subsequent course of decision confirms, that an insurance without either authority or interest, may be rendered valid by a ratification which will take the place of a command on proof that the policy was intended for the benefit of the principal, although made in the name of the self-constituted agent. 1 Taunt. 325; *Sterling v. Vaughan*, 11 East, 619; *Routh v. Thompson*, 13 Id. 274; *Wolfe v. Horncastle*, 1 B. & P. 316; *Hagedorn v. Oliver-son*, 2 M. & S. 485; *The Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Fleming v. The Marine Ins. Co.*, 4 Wharton, 59; *Newsom v. Douglass*, 7 Harris & J. 451; *The Augusta Ins. Co. v. Abbott*, 12 Maryland, 348, 373; *Watson v. Swann*, 11 C. B., N. S. 756. The ratification may be after the loss as well as before; *Hagedorn v. Oliver-son*; *Stillwell v. Staples*, 19 New York, 401; *Watkins v. Durand*, 1 Porter, Alabama, 251; and the institution of the suit is sufficient evidence of ratification. *Fleming v. The Marine Insurance Company*.

In *The Protection Insurance Company v. Wilson*, an insurance broker was accordingly held entitled to insure for the benefit of whom it might concern, without stating that he was not the owner, and the same principle was applied in *Fleming v. The Marine Ins. Co.*, 4 Wharton, 59.

To make a ratification effectual, the act must, however, have been

done for and on behalf of the person by whom it is adopted. A man cannot take out a policy for himself and then appropriate it to the use of another as an afterthought. *Newsom v. Douglass*, 7 Harris, 451; *The Augusta Ins. Co. v. Abbott*, 12 Maryland, 348; *Watson v. Swann*, 11 C. B., N. S. 755. The question is one of fact, depending on the purpose with which the insurance was effected. *Fleming v. The Marine Insurance Company*, 4 Wharton, 59; *De Bolle v. The Pennsylvania Ins. Co.*, Ib. 68, 76; *Steele v. The Franklin Insurance Company*, 5 Harris, 290, 298; *The Augusta Insurance Company v. Abbott*, 12 Maryland, 348. All the authorities on the subject, said Kennedy, J., in *De Bolle v. The Insurance Company*, "tend to show that the intention of the party effecting the insurance, at the time of doing so, ought to lead and govern the future use of it, and that no one can by any subsequent act entitle himself to claim the benefit of it without showing that his interest was intended to be embraced by it when it was made."

These observations were cited and approved, in *Steele v. The Franklin Fire Insurance Company*. And in *Watson v. Swann*, Erle, C. J., said, "no one can sue upon a contract unless it has been made by an agent professing to act for him, and whose act has been ratified by him;" and Watson, J., added "that the person for whom the agent professes to act must be a person capable of being ascertained at the time."

It is established under these decisions, that if the intention does not exist at the time, it cannot be imported into the contract subsequently; and the burden of proof is on the plaintiff, to show that an instrument in which he is not named was really intended for his benefit. *Steele v. The Franklin Ins. Co.*, 5 Harris, 290.

In general, an agent may enter into a written contract in his own name and enforce it subsequently by a suit for the use of the principal. It is not, ordinarily, a defence to such an action, that the agent contracted as a principal, or that the agency is not disclosed by the writing. See *Hubbert v. Borden*, 6 Wharton, 79; *Beckham v. Drake*, 9 M. & W. 79, 11 Id. 315; 2 House of Lords Cases, 579; *Beckham v. Knight*, 4 Bingh. N. C. 243; 1 M. & G. 738. But this is only true when the extrinsic evidence leads without contradicting the instrument. A contract to indemnify A. cannot be turned into a contract to afford an indemnity to B., by proof that such was the design with which A. contracted. *Watson v. Swann*, 11 C. B., N. S. 756. To render an insurance in the name of one person effectual for the protection of another, it must consequently contain the words "for whom it may concern," or some other equivalent expression. *Finney v. The Bedford Ins. Co.*, 8 Metcalf 348; *Turner v. Burrows*, 5 Wend. 541; *Grover v. The Boston Marine Ins. Co.*, 2 Cranch, 419; *Wise v. The Marine*

*Ins. Co.*, 23 Missouri, 86; *Plahto v. The M. & M. Ins. Co.*, 38 Id. 248.

In *Stillwell v. Staples*, 19 New York, 400, the court held that until an unauthorized insurance receives the stamp of ratification, it is subject to the control of the self-constituted agent, who may release or surrender it at pleasure. And it was said to follow that if a bailee covers the bailor's goods and his own by one policy, without an authority from the bailor, and the proceeds of the insurance do not exceed the loss actually sustained by the bailee, he may retain the whole, unless the bailor adopts the contract before the money is actually paid by the insurers. This reasoning is not altogether satisfactory. If such an insurance is effected by virtue of an implied authority or trust, it is binding from the outset, and does not stand in need of ratification. If, on the other hand, the trust is merely voluntary, it may still be irrevocable after it is declared. See *Siter v. Morris*, 1 Harris, 318; *Waters v. The Monarch Ins. Co.*, 5 Ellis & Bl. 870; *The London & Northwestern Railway v. Glyn*, 1 Ellis & Ellis, 652. The point actually determined in *Stillwell v. Staples* would, however, seem to be entirely just, because equity will not enforce a trust in favor of a volunteer, until the claims of the person from whom the consideration moves are satisfied. It is true, said Wightman, J., in *The Railway Co. v. Glyn*, that this insurance is in the nature of a voluntary trust undertaken by the plaintiffs without the knowledge of the *cestui que trusts*, the owners of the goods; but it is a trust clearly binding on the plaintiffs in equity, who will hold the amount which they now recover in trust, in the first place for the satisfaction of their own claims, and in the next, as to the residue in trust for the owners. It was, notwithstanding, held in *Siter v. Morris*, 1 Harris 50, that all the parties to such an insurance stand on an equal footing, and are entitled to share alike if there is not enough for all.

Every one who would be answerable in the event of loss may effect an insurance for his own protection. This principle lies at the foundation of the contract of reinsurance. *The Philadelphia Ins. Co. v. The Washington Ins. Co.*, 11 Harris, 250; *The New York Bowery Ins. Co. v. The New York Ins. Co.*, 12 Wend. 357; and has been applied in a great variety of other instances. A common carrier would have an insurable interest on this ground if there were no other. *Crowley v. Cohen*, 3 B. & Ad. 478; *Vannatta v. The Mutual Ins. Co.*, 2 Sandford, 490; *Savage v. The Corn Exchange Ins. Co.*, 36 New York, 655. The principle, however, does not apply to losses by the perils of the seas, which are excepted from the bill of lading, nor to a carrier by land, who guards himself from liability by notice. It has been said to follow, that a carrier who is not responsible for losses by fire cannot effect a fire insurance; *Steele v. The Frank-*

in *Fire Ins. Co.*, 5 Harris, 290; but this decision is contrary to the English authorities, which establish that a warehouseman, carrier or other bailee, may insure to the full value of the property, even when he is not liable for injuries occasioned by accidental causes. *Savage v. The Corn Exchange Ins. Co.*, 1 Bosworth, 1; *Walters v. The Monarch Life Ins. Co.*, 5 Ellis & Bl. 870; *The London & Western & North-western R. Co. v. Glyn*, 1 Ellis & Ellis, 651.

A hirer or borrower who enters into an absolute agreement for the return of the chattel entrusted to his keeping, has an insurable interest; and in *Olive v. Logan*, 13 Mass. 133, the plaintiff was held entitled to recover the whole value of the vessel, although his title only extended to one-half, on proof that he had chartered the residue, with a stipulation to be answerable for it in the event of loss. For a like reason, an agreement by a special owner to insure in the name of the general owner, may be executed through a policy in the name of the person who makes the agreement. An insurance by a charterer who had covenanted to insure the vessel, was upheld in *Bartlett v. Walton*, 13 Mass. 267, by virtue of this doctrine, which also applies when a mortgagee or vendor agrees to keep the premises insured for the benefit of the mortgagor or purchaser (ante); *The Cr. M. Ins. Co. of Wheeling v. Morrison*, 11 Leigh, 354; *Kernochan v. The Ins. Co.*, 17 New York, 428; or conversely when the mortgagor or vendee enters into such an agreement with the mortgagee or vendor (ante 833). *Benjamin v. The Saratoga M. & F. Ins. Co.*, 17 New York, 414; *Cresswell v. The Brooklyn F. Ins. Co.*, 39 Barb. 227. The principle is the same when one of several tenants covenants to insure for the benefit of the others, or a lessee for years enters into such an agreement with the landlord. *Motley v. The Ins. Co.*, 29 Maine, 336; *Starks v. Sikes*, 8 Gray, 609.

It is commonly said that the insured must be interested when the policy is effected and at the time of the loss (ante, 806). Neither branch of this proposition is strictly accurate. What the former signifies is, that a policy intended as a wager will not be rendered valid by the subsequent acquisition of an interest in the property at risk. The contract of insurance would not be adequate as one of indemnity if it could not extend to future purchases, which there might not be time to cover after they were made. *Rhind v. Wilkinson*, 2 Taunton, 237; *Lane v. The Maine M. Ins. Co.*, 12 Maine, 44. In *Rhind v. Wilkinson*, it was said to be "an every day's experience to insure goods for the return voyage long before the goods were bought." An insurance by a shopkeeper of his stock in trade, will therefore cover such goods as he may buy from time to time, in the course of his business. *Hooper v. The Hudson River F. Ins. Co.*, 17 New York, 424, 426; *Wolf v. The Safety F. Ins. Co.*, 39, Id. 49; *Hoffman v. The Ætna Ins. Co.*, 32 Id. 405. In *Wolf v. The Safety F. Ins. Co.*, the court said that a condition

against alienation did not apply to a stock of goods kept for sale. It had been repeatedly held that the assured might sell and replace his entire stock as often as his own interests might require, and that the policy would protect whatever goods might chance to be on hand when the loss occurred.

Accordingly, when the person insured under such a policy, sold his entire stock of goods and bought them back again after an interval of six months, the court held that he might still recover for a subsequent loss. *Lane v. The Marine M. Ins. Co.*, 12 Maine, 44. Under these circumstances, the contract is suspended but not vacated, and revives when the subject is again brought within the reach of the policy. *Hopper v. The Hudson River F. Ins. Co.*; *Wolf v. The Safety M. Ins. Co.* The principle would apparently be the same in the case of the sale and repurchase of a house or vessel. In like manner a wharfinger or warehouseman may maintain a floating policy for the protection of such goods as may be sent to him from time to time in the course of his business. *Crowley v. Cohen*, 3 B. & Ad. 478; *Waters v. The Monarch F. & L. Ins. Co.*, 5 Ellis & Bl. 870, 886. So a householder who has insured his furniture, will not lose the protection of the policy by buying new carpets or refurnishing his dwelling.

In like manner, a purchaser may insure against an injury which occurred before the goods were bought. *Sutherland v. Pratt*, 11 M. & W. 296; *Mead v. Davidson*, 3 Ad. & E. 303. It is well settled, that a past event may be the subject of an insurance. *The Philada. L. Ins. Co. v. The American L. & F. Ins. Co.*, 11 Harris, 65. This results from a principle common to aleatory contracts. In the noted case of *The Earl of March v. Piggot*, 5 Burrow, 3802, Mr. Piggot wagered that his father would survive Sir Wm. Coddington. In point of fact, his father was actually dead, but this was not known at the time to either party. It was objected that the contract was invalid for want of a consideration. The parties contemplated a future contingency, and not an event which had already happened. Mr. Piggot incurred a certain loss, and there was no risk on the part of Earl of March. The King's Bench were, however, of opinion, that if the event was certain in one aspect, it was uncertain in another, because the parties did not know how it would turn out. The plaintiff accordingly had judgment.

It is established under this doctrine, that an insurance, lost or not lost, will cover a loss occurring prior to the execution of the policy, if the injury is unknown to both the parties, or both are cognizant of it. *Mead v. Davidson*, 3 A. & E. 303, 11 M. & W. 296, 301. The question arose in *Sutherland v. Pratt*, on a demurrer to a plea alleging that the loss in the declaration mentioned, occurred before the plaintiff acquired or had any interest in the property at risk. The defence set



up by the plea, said Park Baron, in delivering judgment, "is no answer to the declaration. The plea admits expressly, that the plaintiff had, during the voyage, an interest in the goods on board, to the amount insured thereon, and it admits impliedly (for it does not deny that allegation), that the insurance was made for the use and benefit and on the account of the plaintiff, that is, as a contract of indemnity to the plaintiff, against any loss in respect of that interest, by any of the perils insured against. This being admitted, the simple question is, whether it is an answer to an action on a policy on goods (lost or not lost), that the interest in them was not acquired until after the loss. We are of opinion that it is not. Such a policy is clearly a contract of indemnity against all past, as well as future losses, sustained by the assured, in respect to the interest insured. It operates just in the same way as if the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good. The plea, therefore is bad in substance."

"It was argued that upon the pleadings, it might be assumed that the plaintiff bought the goods in their damaged state, and consequently was not entitled to any indemnity for that damage. But it does not appear that he had purchased them as damaged goods. If that had been true, he could not have recovered on this policy, on a plea denying the loss by the plaintiff by perils of the seas; and that would have been the proper form of plea to have raised this question."

In this instance, the loss was merely partial; and the better opinion seems to be that as the sale of a chattel, which has been destroyed by the perils of the sea, or in any other way, is invalid; *Barr v. Gibson*, 3 M. & W. 390; it will not confer an insurable interest; *Sutherland v. Pratt*, 11 M. & W. 296, 301; unless the consideration is a loan, or paid in advance, when the vendee will be interested in the preservation of the property as a means of reimbursement.

The words lost or not lost, are only important as showing an intention that the contract shall operate retroactively; and the effect will be the same when this appears in any other manner. A policy on time will, therefore, cover a loss occurring after the inception of the risk, although before the execution of the policy. *Coggs v. The American Ins. Co.*, 4 Wend. 283. And this equally is true of an agreement by one insurer, to assume a risk which has been taken by another. *The Philada. Life Ins. Co. v. The American L. & F. Ins. Co.*, 11 Harris, 65. Under these circumstances, the contract must relate back to the inception of the risk in order to attain the object. In *The Philada. Life Ins. Co. v. The American L. & M. Ins. Co.*, the defendants were accordingly held liable on a reinsurance of the life of Maxwell Nusbaum, for the term of one year, although Nusbaum was

dead when the policy was executed, and it did not state when the year was to begin. And the insurers are in general answerable for a loss occurring subsequently to the time appointed for the inception of the risk, although before the insurance was effected. *Hallock v. The Ins. Co.*, 2 Dutcher, 268.

The damages in an action on a policy of insurance will be measured by the injury to the property at risk, unless it is clearly apparent that a smaller sum will be an adequate compensation for the loss sustained by the person for whose benefit the insurance was effected. The recovery of a mortgagee or vendor may consequently extend to the whole value of the building, although the land is a sufficient security for the debt. *King v. The M. F. Ins. Co.*, 5 Cushing, 1; *Updegraff v. The Insurance Co.*, 9 Harris, 513 (ante). In like manner, if the loss sustained by a tenant, for life or by the courtesy is less in one sense than if he owned the fee, it cannot be made good in another without paying him a sufficient sum to rebuild the premises or procure another house. *Curry v. The Commonwealth Ins. Co.*, 10 Pick, 535; *The Franklin Fire Ins. Co. v. Drake*, 2 B. Monroe, 471. If there be an equity controlling the strict letter of the contract, it is not on the side of the insurers who have received a full consideration; *King v. The Insurance Co.*, but of the reversioner or remainderman to have the fund specifically applied to the restoration of the building. *Brough v. Higgins*, 2 Grattan, 408. So a tenant who has the privilege of removing a building at the end of the term, may recover the whole value of the structure as it stood, although it would have been worth little or nothing if taken down. *Laurent v. The Chatham Fire Ins. Co.*, 1 Hall, 41 (ante, 811). The principle is the same when a house is built in pursuance of an authority given by the owner of the land, with an express or implied right of removal if the license is revoked. *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. 417. Another instance of the principle may be afforded when a building which has been mortgaged for more than it is worth, is conveyed subject to the mortgage. Under these circumstances the purchaser acquires nothing of a pecuniary value, and is not liable for the debt; but he has, notwithstanding, an insurable interest, which agreeably to *Borden v. The Hingham Fire Ins. Co.*, 18 Pick, 523, should be measured by the cost of the building, without regard to the incumbrance (ante).

A policy of insurance against fire, or the perils of the seas, is properly a contract of indemnity to make good the loss sustained by the insured in his goods, buildings or effects. *Dalby v. The Life Insurance Co.*, 15 C. B. 365, 387. If the plaintiff had no interest, or if that interest was not damaged by the event against which the insurers stipulated, he is not entitled to judgment. *Hamilton v. Mendes*, 2 Burrow, 1210. It has indeed been said that insurances without interest were valid under the common and commercial law. *Crawford v. Hunter*,

8 Term, 13; *Powles v. Innes*, 11 M. & W. 10. And in *Powles v. Innes*, Lord Abinger seems to have thought that insurance was a gaming contract, which Parliament had converted into a contract of indemnity; but this is questionable if predicated of a policy in the ordinary form, because the language and indeed the name of the contract import; that the object is security against actual loss. Thus Emerigon observes that a promise to pay a sum certain on the arrival of a vessel, or if she is lost at sea, is a wager in terms, as it may be in design; but that an instrument by which the owner of a ship or cargo causes himself to be insured against the happening of an event by which it may be injured, is agreeably to the ordinary use of words, a contract to save him harmless, which must necessarily fail unless he has some interest in the property at risk. Emerigon *Traité des Assurances*, Chap. 1, Sect. 1. In like manner Lord Hardwicke observed in *The Sadler's Ins. Co. v. Badcock*, 2 Akyns, 534, that a fire policy must be construed as a contract to insure the person, because it is obviously impracticable to insure the thing. In *Goddard v. Garret*, 2 Vernon, 268, it was said to be the established rule that if a man causes himself to be insured without interest, the insurance is void, although it be expressed in the policy "interest, or no interest."

It is therefore, obvious, that when the policy fails as an insurance from the want of interest, it cannot be enforced as a wager without doing violence to the intention of the parties, by substituting a new contract for that originally contemplated. A court of equity would consequently intervene under these circumstances for the protection of the insurer by ordering the policy to be surrendered for cancellation; *Lucena v. Crawford*, 2 New Rep. 315; and this course was pursued in *Goddard v. Garrett*, 2 Vernon, 267, although the instrument was expressed "interest or no interest."

In *Lucena v. Crawford*, 2 New R. 269, 322, Lord Eldon observed on this decision and the dicta of Lord Kenyon, in *Crawford v. Hunter*, 8 Term, 13, that the words interest or no interest were meant only to dispense with the proof of interest. If the insurer, after having admitted the existence of an interest which was supposed to be incapable of proof, discovered that no interest existed, he might complain to a court of equity that he had been surprised, and the policy would be ordered to be delivered up. Such decrees had been made in numerous instances, and could only be explained on this ground. It follows, that if the clause "interest or no interest" may operate as a waiver where a real interest is at risk, it will not uphold a wager. *Ruse v. The Mutual Life Insurance Company*, 23 New York, 516, 524. The case of *Depaiba v. Ludlow*, Comyn, 369, is not at variance with these principles. The court held that where the policy is expressed to be interest or no interest, the insurers are precluded from

controverting the plaintiff's interest, but it did not follow that they could not show that the policy was intended as a wager, and not for the protection of an interest, which though real, was insusceptible of being established with the certainty required by the rules of evidence. The better opinion would therefore seem to be, that a recovery cannot be had on a policy without interest, unless it appears not only that the plaintiff intended to make a wager as distinguished from an insurance, but that the defendants knew and acquiesced in this design.

It is, however, obvious that an insurance may be used as a cover for a wager, or a wager made in the form of an insurance; *Patterson v. Powell*, 9 Bing. 320; 2 Smith's Leading Cases, 336, 6 Am. ed.; as in the case of *Roebuck v. Hamerton*, Cowper, 737, where a wager on the sex of the Chevalier D'Eon, was drawn as a policy; and the English judges have in general held that while an insurance is *prima facie* a contract for indemnity, this presumption may still be repelled by the language of the instrument, or by extrinsic evidence showing that the intention was to wager and not to insure. Hence, policies without interest, or wagers in the form of policies, were of constant occurrence, until the statute 19 Geo. II. c. 7, rendered all insurances without interest, on ships belonging to the king or any of his subjects illegal and void; and are still valid, when foreign ships, which do not fall within the words of that statute, are in question. Thus, in *Crawford v. Hunter*, 8 Term, 13, a declaration on the insurance of a foreign ship was held good without an averment of interest, apparently on the ground, that the policy itself, when given in evidence, might disclose an intention to wager and not to insure. This decision was followed in *Nantes v. Thompson*, 2 East, 385, and judgment given for the plaintiff, on a demurrer to a declaration which contained no averment of interest, notwithstanding the argument that the use of the word "insured" in the policy necessarily implied an agreement to indemnify, and therefore required that some interest should be set forth, as a means of showing that the destruction of the vessel had resulted in loss or injury. But this objection was overruled by the court, on the ground that usage had attached a secondary meaning to the word insurance, which, though less appropriate, was perfectly well known and understood, under which it might be enforced as a wager, when the want of interest rendered it inoperative as a contract of indemnity or insurance, in the proper sense of the term. "That the word assured," said Grose, J., "may be understood to import a contract to pay a certain sum upon the happening of the events specified in a policy, without any regard to interest, seems to follow from what was not denied by the defendant's counsel, viz., that the plaintiff might have recovered, had the policy used the words, 'interest or no interest,' in which case, unless a sense be given to the word assured, different from

its proper meaning, there would be a contradiction in terms; for it would be a contract to indemnify a man against risks, by which, on the face of the instrument, it would appear that he could not be damaged; and to make such contract intelligible, the words 'interest or no interest,' must be understood as pointing out, that the word 'assured' was not to be understood in its original and proper sense. In making the statute 19 Geo. 2, the Legislature must have understood that the word 'assured' had an improper, as well as a proper meaning, by its prohibiting assurances, 'interest or no interest, which is a very different thing from an insurance without further proof of interest than the policy, which is also mentioned in the statute; for the latter is an admission of interest to the amount of the sum in the policy, and is consistent with the proper sense of the word 'assured,' and not like an insurance without interest, which in strict sense, would be a contradiction in terms. The statute 14 Geo. 3, c. 48, also treats this word 'insurance,' as having this less proper sense. Its title is 'An act for regulating insurances on lives, and for prohibiting such insurances, except in cases where persons insuring shall have an interest in the life or death of the persons insured; and its preamble recites, that the making of insurances on lives or other events, wherein the insured shall have no interest, has introduced a mischievous kind of gaming; and then the statute enacts, that no insurance shall be made on any event, wherein the person on whose account such policies shall be made shall have no interest. Here the Legislature treats insurance as a thing which may exist without an interest; but if, according to the defendant's argument, that could not be, the act should have been against wagering under the form or pretence of insurance, and should have enacted that no agreement of the parties, to dispense with the proof of interest or admission of interest, if it could be shown not to exist, should enable the persons so contracting to recover."

The defect in this reasoning obviously is, that if the appropriate sense of the word "insure" be to indemnify, or save harmless, a declaration on a policy of insurance, which neither avers interest, nor excuses the want of such an averment, by an allegation that the policy was made without reference to interest, or was intended as a wager, must necessarily be bad, as founded upon a promise of indemnity, and yet, not showing that the plaintiff has been damaged. The judgment of the King's Bench was accordingly reversed in error, by the Exchequer Chamber; Mansfield, C. J., remarking that every insurance must be presumed to be on interest, until the contrary appeared, and that a policy consequently could not be construed as a wager, without something to show that such was its true character. *Cousin v. Nantes*, 3 Taunton, 113.

It is established in England under this decision, that a recovery

cannot be had on a policy of insurance without averring interest, and sustaining the allegation by proof; 2 Arnould on Insurance, 1265; and such would also seem to be the rule in the United States. *The Illinois M. L. Ins. Co. v. The Marseilles M. Ins. Co.*, Gilman, 236, 264; *Gilbert v. The North Am. Ins. Co.*, 23 Wend. 43; *Howard v. The Albany Ins. Co.*, 3 Denio, 301; *Ruse v. The M. L. Ins. Co.*, 23 New York, 516. A line is, however, drawn in New York, under which interest must be averred in declaring on a life or fire policy; *Freeman v. The Fulton Fire Ins. Co.*, 38 Barb. 247; *Fowler v. The New York Ins. Co.*, 23 Barb. 143; 26 New York, 422-23; *Ruse v. The M. L. Ins. Co.*; *Howard v. The Albany Ins. Co.*, but not when the insurance is against loss by the perils of the sea. *Clendenning v. Church*, 3 Caines, 141; *Buchanan v. The Ocean Ins. Co.*, 6 Cowen, 322; *Juhel v. Church*, 2 Johnson's Cases, 333; *Fowler v. The New York Ins. Co.*; *Freeman v. The Fulton F. Ins. Co.* But this distinction which seems to have had its origin in the judgment of the court below, in *Cousin v. Nantes*, was disapproved in *Ruse v. The M. L. Ins. Co.*, 23 New York, 516, 524; and would hardly be sustained if the point were to arise on demurrer, at the present day. In *Clendenning v. Church*, and *Buchanan v. The Ocean Ins. Co.*, where the policy dispensed with proof of interest, and there was no interest at risk to which it could apply, the court held, that the contract could not have been intended as an indemnity, and must consequently be construed as a wager. But judgment was given in both these cases for the insurers, on the ground that, although insurances without interest were valid, they were mere bets on the arrival of the vessel, which gave no right of action to the insured for partial injuries, nor unless the completion of the voyage was prevented by her entire destruction; and Kent, C. J., said in *Clendenning v. Church*, that wager policies ought not to be encouraged, nor the time of the court occupied in discussing them. Statutory enactments have now rendered contracts of wager invalid in some of the States of the Union, among which may be enumerated New York and Connecticut; *Wheeler v. Spencer*, 15 Conn. 28; *Fowler v. Van Saardam*, 1 Denio, 537; while the courts have been guided to the same result in others, by general principles of policy and morals. *Thomas v. Cronise*, 16 Ohio, 54; *West v. Holmes*, 26 Vermont, 530; 2 Smith's Leading Cases, 343, 6 Am. ed. It would, moreover, appear—and the general current of authority in this country sanctions the position—that if wagers may be enforced under ordinary circumstances, they should still be held void, when made on the loss or destruction of a house or vessel, as having an especial tendency to endanger the safety and well being of the community. *The Sadler's Co. v. Badcock*, 2 Atkyns, 554, 556; *Ruse v. The M. B. L. Ins. Co.*, 23 New York, 516, 523. Accordingly, when the question arose in *Armory v. Gilman*, 2 Mass.

1, the court inclined to the opinion, that if the policy before them was intended to take effect without regard to interest, it was invalid as being a wager in an objectionable form. A similar view was taken at an early period in Pennsylvania in advance of the subsequent course of decision under which all gaming contracts are illegal and void. And an insurance without interest would probably be held invalid, even in those States where a recovery may still be had on an ordinary bet. A wager on the life of a human being, a wager that a man who is under indictment will be convicted, a wager on the result of an election; in short, every gaming contract having a dangerous or immoral tendency, is contrary to the fundamental principles of jurisprudence, and cannot be made a ground of recovery in a court of justice. The mere possibility that the wager may have an undue influence on the mind of another, is enough to render it void. *Evans v. Jones*, 5 M. & W. 77, 81.

An insurance by a stranger to the ship and cargo, is clearly within this rule. Property and life, the common interest, and the safety of the crew and passengers, are alike endangered by a contract, which furnishes a powerful motive for compassing the destruction of the vessel or breaking up the voyage. It is therefore probable that a wager, in the form of a policy, on the life of a human being or the loss of a vessel would now be held invalid in England and the United States, on general principles. *Fowler v. The New York Ins. Co.*, 26 New York, 422; *Gilbert v. The North American Fire Ins. Co.*, 23 Wend. 43; *The Mutual Fire Ins. Co. v. The Marseilles Manufacturing Co.*, 1 Gilman, 236; *Adams v. The Ins. Co.*, 1 Rawle, 107.

It has, indeed, been said, that an action may be sustained in one State of the Union on a policy executed in another, without proof of interest, on the ground that wager policies were good at common law, and that the common law must be presumed to prevail, unless some proof is given that it does not. *St. John v. The American M. Life Ins. Co.*, 2 Duer, 419. But this dictum was not necessary to the decision of the cause, and seems to have been uttered without adverting to the distinction between a policy intended as a provision for the contingency of death, and a wager policy in the strict sense of the term.

The authorities in England and this country concur in holding that a valuation made in good faith, and not as a cloak for a wager, is binding on the insurers, and cannot be opened for the purpose of showing that it exceeds the real value, although going much beyond what is needed for indemnity. *Howes v. The Union Ins. Co.*, 16 Louisiana, Ann. 235; *Delano v. The American Ins. Co.*, 42 Barb. 422 (ante, 718). In *Clark v. The Ocean Ins. Co.*, 20 Pick. 280, the plaintiff was allowed to recover the whole amount of the valuation, although the interest at risk was susceptible of an exact computation, which showed that the loss did not equal one-fifth of the sum which the insurers were thus compelled to

pay. Similar decisions were made in *Coolidge v. The Gloucester Marine Ins. Co.*, 15 Mass. 354; *Robinson v. The Manufacturers' Ins. Co.*, 1 Metcalf, 143; *Huth v. The New York Ins. Co.*, 8 Bosworth, 538; *Griswold v. The Union Ins. Co.*, 3 Blatchford, C. C. R. 231; *Alsop v. The Commercial Ins. Co.*, 1 Sumner, 451; and *Hancox v. The Fishing Ins. Co.* 3 Id. 132; while in *Manning v. Irving*, 1 C. B. 178; 2 Id. 784; 6 Id., 391 (ante, 718), judgment was rendered against the insurers for £17,000, on a valued policy, although the vessel insured was worth only £9,000, and might have been repaired for £10,500, thus giving the insured £6,500 more than he could have recovered, if the question had arisen on the evidence. In like manner, the receipt of a full indemnity for the loss, under the provisions of a prior insurance, will not preclude a recovery on a subsequent valued policy, for the excess of the valuation over the amount thus received, even when the latter contains an express proviso, that it shall only extend to so much of the property as is not covered by any prior insurance. *Pleasants v. The Maryland Ins. Co.*, 8 Cranch, 56; *Kane v. The Columbian Ins. Co.*, 8 Johnson, 229; *Minturn v. The Columbian Ins. Co.*, 10 Id. 75.

This course of decision, seems to have originated in the difficulty of substantiating the extent and value of the interest at risk, under the rules of evidence, and the consequent necessity for allowing the parties to liquidate the damages beforehand by agreement. There are many cases where the real value of the property to the owner, or the injury which he will sustain if it is destroyed, cannot be shown with certainty by the ordinary means of proof. Hence the courts have sanctioned a seeming departure from the true end of the contract of insurance, in order to reach it more effectually, and permit the parties to affix an arbitrary value to the property insured, which derives its force from their mutual agreement, and can only be set aside for mistake or fraud (ante, 719).

This is strikingly illustrated by the case of *Manning v. Irving*, where the special verdict showed, that although the market value of the vessel, which would have been the measure of damages in a suit on an open policy, was only £9,000, she had cost £17,500, if the seamen's wages, stores, and other expenditures incurred during the prosecution of the voyage, were taken into the account and added to her intrinsic value. An inquiry conducted under the ordinary rules of evidence, would therefore have been inadequate to the exigencies of the case and the purposes of substantial justice, which could only be attained by permitting the parties to fix the value at risk by an agreement which obviated the difficulties that would necessarily have attended on an attempt to establish it by proof.

An insurance, interest or no interest, is invalid in England as contrary to the 19 Geo. 2, c. 7 (ante); *Alsop v. The Commercial Ins. Co.*,



1 Sumner, 451; and it seems to have been thought in *Juhel v. Church*, 2 Johnson's Cases, 233, that such a policy is *prima facie*, if not necessarily a wager. But the distinction is plain, both in reason and under the authority of *Goddart v. Garret* (ante, 851), between a gaming contract and the insurance of an interest which, though real, is too indefinite for proof. There are many cases where the injury arising from the loss of a cargo or vessel is a fit subject for a contract of indemnity, and yet incapable of being demonstrated consistently with the rules of evidence. A recovery cannot, for instance, be had under an insurance on freight without proving a contract with a third person to provide a cargo, or that the goods were actually on board, and yet the interest of the shipowner in the arrival of his vessel at a port where there is a want of the means of transportation, may be all the greater, because he is unfettered by prior engagements and at liberty to demand the highest rate of compensation (ante, 817). Hence, a difficulty arises which can only be obviated by superseding the ordinary rules of evidence, and insuring the freight "carried or not carried," which will substitute stipulation for proof, and entitle the insured to recover on proving the commencement of the risk, and the loss of the vessel before its completion. *De Longuemere v. The Phoenix Ins. Co.*, 10 Johnson, 127. The end, in this case, justifies the means, and renders the policy binding, not as an insurance without interest, but as an insurance of an interest which really exists, although insusceptible of exact demonstration. And it would seem well settled, under the American cases, which differ in this respect from those in England, that an insurance on profits may be enforced, without proving that a profit would have been made had the goods arrived in safety, and even in opposition to proof that the shipment would have come to a losing market, and consequently resulted in a loss to all concerned. *Mumford v. Hallett*, 1 Johnson, 439; *The Palapsco Ins. Co., v. Coulter*, 3 Peters, 399. The case of *Putnam v. The M. M. Ins. Co.*, 5 Met. 386, went still farther in the same direction, by deciding that an insurance of the commissions on goods, which had been consigned for sale to the plaintiff, was valid, although he had made no advances upon them, and there was nothing to prevent a revocation of his authority, and the diversion of the consignment to another quarter. This decision, which was sustained by a reference to a dictum of the same court, in *French v. The Ins Co.*, 16 Pick. 30, would seem at variance with the language of Lord Eldon in *Lucena v. Crawford* (ante), and may be thought to show, that the American courts are disposed to adopt a more liberal rule on this difficult and entangled question, than that which prevails in England. And the better opinion would seem to be, that a policy made for the protection of a real interest, will not be invalid under the law of this country, because it dispenses with all proof of interest. The only difference be-

tween such a stipulation and an ordinary valuation, is, that the one exonerates the insured from adducing proof of the quantum, or amount of the interest at risk, while the other relieves him from the necessity of establishing its existence. Both have their foundation in the necessity of substituting admission for proof, and both obviously tend to free the insured from the rules which confine the contract of insurance to the purpose of an indemnity, and preclude it from being used for that of gain. Every valuation which exceeds the real value at risk borders closely on a wager, and may obviously produce the same result as if the property had been covered by an open policy, and the excess wagered on the arrival of the vessel. Yet, we have seen, that a valuation made in good faith for the protection of a real interest, will be upheld, in opposition to the clearest and most convincing evidence, that it goes beyond the real value of the property at risk, and may render the loss of the cargo or vessel a source of gain. Still the maxim *modus et conventio vincunt legem* has certain limits, and will not sustain a stipulation which is contrary to legal policy. The insurers may consequently show that the valuation was procured through fraud—that the property to which it relates was not at risk—or that it was designed as a cloak for a wager; *Alsop v. The Commercial Ins. Co.*, 1 Sumner, 457; *Howe v. Union Ins. Co.*, 16 Louisiana, Ann. 235; and it has been held that a gross over-valuation unexplained, is of itself a proof of fraud. *Griswold v. The Union Ins. Co.*, 3 Blatchford, C. C. R. 231.

The question arose in *Alsop v. The Commercial Ins. Co.*, which was an insurance of \$10,000 on profits valued at \$20,000, "on goods on board "The Brig Leonora," at and from Callao to Baltimore, the policy to be the only proof of interest required. The only cargo of "The Leonora" at the time of her departure from Callao, was bullion, to the amount of \$11,821, and hides, invoiced at \$7,765. This state of facts gave rise to an argument which was pressed with much force on the part of the insurers, that as no profit could well accrue from a commodity which, like bullion, bore nearly the same value in all parts of the world, and the evidence adduced by the insured, fixed the profits on the hides at \$2,000, the policy was virtually a wager, and should either be set aside altogether, as invalid, or the excess of the valuation stricken off, and the recovery limited to the real value. It was also said, on the same side of the question, that a judgment for the plaintiff, who had already received \$10,000 from an insurance company in New York, on another policy on the same risk, would give him ten times the amount which would have been gained had the vessel arrived in safety, and turn the contract from its true purpose of an indemnity, to that of a bet, or wager. The question whether the policy was intended as a wager, and whether the interest which it was designed to cover had been at risk, was left to the jury, who found a verdict for the plaintiff,

which was subsequently sustained, on a motion for a new trial. "There is," said Story, J., who delivered the opinion of the court, "this difference between policies in America and policies in England, containing stipulations like those in the present policy, 'interest or no interest,' or 'without further proof of interest than the policy'—that, in the latter country, such policies being prohibited as wager policies, the insertion of the prohibited words in the policy, is proof *de facto* that they are mere wagers, whereas, in America such policies are not treated as necessarily purporting to be wager policies, but they are deemed policies on interest, if the parties so understood and agreed. So it was held in *Armory v. Gilman*, 2 Mass. R. I., and in *Clendenning v. Church*, 3 Caine's R. 141: *prima facie* they so import, but the implication may be rebutted by proofs or admissions.

"Now, in the present case, it is (as I have already stated) admitted, that the defendants meant to enter into a policy on interest, and not into a wager policy. They did not intend to wager or game, but to insure substantive interests. Whatever, then, the terms used are, the policy is to be deemed, in point of law, an interest policy. The plaintiff insists that he meant it to be an interest policy, and if he had a substantive interest on board the ship, capable of being insured, I cannot perceive upon what principle the defendants can now treat it as a gaming policy. The policy was a wager policy, as to both parties, or to neither party. It has not a double character as a policy on interest, as to one and not as to the other. If it be a policy on interest, then, undoubtedly, the plaintiff cannot recover, unless he shows an interest, for in Massachusetts, at least, the doctrine of *Goddart v. Garret*, 2 Vernon, R. 269, is in full force.

"But whether the court were, in a strict and technical sense, right, in this view of the matter, or not, I still think that the court did put the law, applicable to a case of this sort, correctly to the jury. The court said, that if the defendants meant to insure on interest, and the plaintiff meant a gaming policy, it was void; so that the point, as to the gaming, was put as favorably for the defendants, and as directly to the jury, as it could be.

"The next exception is, that the court instructed the jury on the point of valuation, that the plaintiff was entitled to a verdict, unless there was an over-valuation made by the plaintiff fraudulently, and with a design to deceive the defendants. To understand this exception fully, it is proper to state, that the line of argument of the counsel for the defendants on this point, was that if there was a designed, gross over-valuation of the profits by the plaintiff (whatever might be the moral character of the transaction), it was in point of law, a constructive fraud upon the defendants, which avoided the policy, and that a trivial interest would not save the policy. And the court expressly gave the same opinion

to the jury. No point was made or argued as to any over-valuation by mistake. But after the close of the argument, the counsel for the defendants requested the court to instruct the jury, that if the plaintiff expected a larger shipment of goods than was actually shipped, and made his valuation of profits upon that basis, he was entitled to recover only *pro rata*, as the actual shipments bore to the expected shipment. And to this doctrine the court assented, and instructed the jury accordingly.

"The charge of the court is now complained of, because it put the case of gross over-valuation as a question of fraud solely. Now, in so doing, it did no more than repeat the very doctrine asserted by the defendants' counsel, and it was no part of its duty to suggest any other points, which, in certain postures of the case, might possibly have been urged by the counsel. But, I am yet to learn, that the law is otherwise than is stated by the court. By the law of Massachusetts, valued policies are valid in general, and, certainly, valued policies on profits fall within the same rule. What, then, is the effect of the valuation in point of law? It is, that it shall, in all cases of total losses, where there is a substantial interest, and *bona fides*, be conclusive in respect to the value. It is true, and it was so stated by the court, that a trivial interest will not save the policy. Neither will a substantive interest, if there is an attempt to deceive or mislead the underwriters. And a gross over-valuation affords a presumption of fraud. But if the policy is procured in entire good faith, if there is no intent to deceive, and if there is a substantial interest, then the over-valuation, whatever it may be, is unimportant. The assured is entitled to recover, upon general principles of law. And, indeed, under such circumstances, the underwriters are estopped to press the inquiry. And in the very policy before the court, the defendants not only agreed to the valuation, and received the premium for it, but they expressly stipulated that the policy should be the only proof of interest required. Upon what ground, other than fraud, are they entitled to escape from such a stipulation? If the policy is upon interest, and the valuation fairly made, and they agree to be bound by it, and they have not been deceived, what right can they have to insist that they ought not to perform their agreement?

"No case has been cited which affirms a different doctrine, and there are many which inculcate this doctrine in cogent terms. In *Lewis v. Rucker*, 2 Burr. R. 1171, Lord Mansfield said: 'It is settled, that upon valued policies, the merchant need only prove some interest to take it out of the statute 10 George II., because the adverse party has admitted the value, and if more was required, the agreed valuation would signify nothing. But if it should come out in proof that a man had insured £2,000, and had an interest on board to the value of a cable only,

there never has been, and I believe there never will be a determination, that by such an evasion the act of Parliament may be evaded. There are many conveniences from allowing valued policies. But where they are used merely as a cover to a wager, they would be considered as an evasion.' Lord Mansfield, in the case of *De Costa v. Firth*, 4 Burr. R. 1969, in the passage already cited, held the same doctrine. I am not aware that a different doctrine has been anywhere established. If the over-valuation be *bona fide*, and innocent, the policy is good ; if fraudulent, it is void."

The distinction between the cases in which an admission of interest, or a dispensation with proof of its existence, is used as the means of making a bet, and those in which it is meant to conduce to the protection of a real interest by obviating the difficulty of establishing it by evidence, is fully sustained by the case of *Goddart v. Garret* (ante, 851), as interpreted by Lord Eldon, in *Lucena v. Crawford*, 2 New Reports, 269 ; while Livingston, J., remarked in *Clendenning v. Church*, 3 Caines, 141, 146, that the object of making the policy proof of interest, is to dispense with the necessity of establishing the existence of interest by the ordinary methods, and that the question, whether an insurance is a wager, depends on the truth of the case, and not on equivocal terms, which may be used for different purposes. We may, therefore, infer that admissions of the existence or amount of the interest at risk, will be upheld and enforced when confined to their proper office, of removing or diminishing the difficulty of proof, although necessarily void when they go beyond it, and are used either as the means of fraud, or for the purpose of disguising a gaming or wagering contract, in the form of a policy of insurance.

A life insurance is a contract to pay a sum certain on the death of a person, in consideration of the payment of a smaller sum yearly or in gross during his life, with the view of making a provision for the future, or guarding against an anticipated loss. *Dalby v. The India and London L. Assurance Co.*, 15 C. B. 665 ; 2 Smith's Leading Cases, 339, 6 Am. ed. ; *The Trenton L. Ins. Co. v. Johnson*, 4 Zabriskie, 576 ; *Cook v. Field*, 15 Q. B. 466 ; *Loos v. The Hancock M. L. Ins. Co.*, 41 Missouri, 538. It is not, therefore, governed by the rules which apply to marine insurances and insurances against fire, and may be valid where there is no interest at risk that can be defined with certainty, or the death against which the policy is conditioned, does not result in loss. It is universally conceded, that a man has an interest in the continuance of his life, which he may insure in his own name, or in that of a third person, for the benefit of his family, or to create a fund for the payment of his debts. *The American L. Ins. Co. v. Robertshaw*, 2 Casey, 189 ; *Collett v. Morrison*, 11 Eng. L. & Eq. 171. A father may insure the life of his minor child ; *Mitchell v. The*

*Union Ins. Co.*, 45 Maine, 104 ; a child that of his father ; *Loomis v. The Eagle Ins. Co.*, 6 Gray, 396 ; or a wife her husband's life ; *Reade v. The Royal Exchange Ins. Co.*, 2 Peake, 151. So, in *Lord v. Dall*, 12 Mass. 115, a sister was allowed to enforce a policy on the life of a brother, who maintained her and paid the premium ; and this case, and that of *Loomis v. The Eagle Ins. Co.*, would seem to indicate that every one has an insurable interest in the life of another, who stands *in loco parentis*, and contributes to his support, although from motives of charity and kindness, and without being under a legal obligation.

It results *a fortiori* that a man may insure the life of a partner, an agent, or a debtor ; *Morell v. The Trenton L. & F. Ins. Co.*, 10 Cushing, 282 ; in short, of any one with whom he has entered into a contract, that may fail or be defeated in the event of death ; *Berlin v. The Conn. M. L. Ins. Co.*, 23 Conn. 244 ; *Hoyt v. The New York Ins. Co.*, 3 Bosworth, 440 ; *Valton v. The National Ins. Co.*, 22 Barb. 9 ; 20 New York, 32 ; and when a valid policy has been effected on these grounds, it will not be vacated by the cessation of the interest which it was designed to protect. *Dalby v. The India & London L. Assurance Co.* It is not, therefore, a sufficient answer to an insurance of the life of a debtor, that the debt has been paid ; *Dalby v. The India & London L. Assurance Co.* ; *St. John v. The M. L. Ins. Co.*, 2 Duer, 419 ; 3 Kernan, 31 ; or in the case of the insurance of the life of a partner, that the firm was subsequently dissolved. The law was so held in *Dalby v. The India & London Assurance Co.*, overruling *Godsal v. Baldero*, 9 East, 72, where the point had been determined the other way.

It results from what has been said, that when a life insurance is designed for a legitimate purpose, it will be upheld by the courts although the plaintiff had no insurable interest in the ordinary sense of the term. But it is equally clear, that as a wager on the life of a human being is contrary to good morals, it will not be rendered valid by being put in the form of an insurance. A policy of insurance bears a close resemblance to a wager (*ante*, 285). See *Patterson v. Powell*, 9 Bing. 320 ; *Good v. Elliott*, 3 Term, 693. Both are aleatory contracts, conditioned on an uncertain event, the intention being in the one case to provide against loss, calamity or want, in the other, to gratify the passion for speculative gain.

A life policy may readily be used as an instrument of gaming, with the concomitant temptation of hastening the event which stands between the party and the hoped for profit. In *Ruse v. The N. Y. Mutual Ins. Co.*, 23 N. Y. 516, "a life policy without interest was said to be as much worse than a wagering policy of any other kind, as a temptation to tamper with life was more dangerous than an inducement to commit a mere pecuniary fraud." It is, therefore, incumbent on a man

who insures the life of another, to show that the contract had a sufficient cause, and if this is not made out with reasonable certainty, to the satisfaction of a court and jury, the instrument should be set aside as forbidden by the policy of the law. *Bevin v. The Conn. M. L. Ins. Co.*, 23 Conn. 244; *Ruse v. The New York L. Ins. Co.*, 23 New York, 516; *Fowler v. The New York L. Ins. Co.*, 23 Barb. 143; 26 New York, 422. See *Howard v. The Albany Ins. Co.*, 2 Comstock, 210; *Freeman v. Fulton*, 38 Barb. 247. What the interest must be, is not well defined under the authorities, but it would seem that an entire absence of pecuniary interest will be fatal to the right to enforce the policy. *Halford v. Kymer*, 10 B. & C. 725. A father may insure the life of an adult son, in the son's name and for his benefit, but if such an insurance were made for the benefit of the father, it would be invalid. *Halford v. Kymer*. See *Shiling v. The Accidental Death Ins. Co.*, 2 H. & N. 42. The court will look to the substance of the transaction rather than the form, and while a policy on a man's own life will be invalid if made on behalf and for the use of another, who uses it as a cover for gaming contract; *Shiling v. The Accidental Death Ins. Co.*; a man may well insure his life in his own name for the benefit of a friend or relative, or in the name of another for the benefit of his executors. See *The American Life Ins. Co. v. Robertshaw*, 2 Casey, 180; *Valton v. The National L. Ass. Co.*, 22 Barb. 9; 20 New York, 32.

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SALE OF PROPERTY.      FORFEITURE OF POLICY.

MARTIN CARROLL AND ANOTHER *v.* THE BOSTON  
MARINE INSURANCE COMPANY.

In the Supreme Court of Massachusetts.

MARCH TERM, 1812.

[REPORTED, 8 MASS. 515-517.]

*The insurers are not liable on a policy of insurance, for a loss happening subsequently to a sale of the property insured.*

[\*THE action was brought by Ebenezer Gay (claiming as assignee of Joshua Snow, a bankrupt), and Martin Carroll, on a policy of insurance effected by Snow and Carroll, on a vessel belonging to them. It appeared from the evidence at the trial, that subsequently to the date of the policy and before the loss, the vessel had been conveyed to one Nathaniel Waterman, in whose

\* The syllabus and statement of the reporter are omitted.

name she was regularly enrolled at the custom house. On this ground, a nonsuit was ordered, subject to the opinion of the court, as to whether the sale of the vessel had determined the right to recover on the policy. A motion was subsequently made to set aside the nonsuit, on the ground that the bill of sale, although absolute on its face, was intended by the parties as a security for the payment of a replevin bond, which Waterman had executed as a surety for the vendors. It was admitted on the argument as a part of the case, that Waterman had subsequently become the absolute owner of the moiety of the vessel belonging to Snow; and had, prior to the expiration of the policy, but after the loss, reconveyed the other moiety to Carroll. The opinion of the court was delivered by]

PARKER, J. It being agreed that, in order to entitle the plaintiff to recover, he must prove an interest in the property at the time the loss happened, the only question is, whether the facts, of which evidence was stated to exist, establish that point.

It has been repeatedly decided here that, under the forms of our policies, none but the parties to the contract, or their legal representatives in case of their death, can avail themselves of the contract; although others may in fact have an equitable, or even legal interest in the property insured. The only exception to this rule which has been admitted, exists where a policy has been *bona fide*, and for a valuable consideration, assigned with notice to the underwriter, and an assent on his part, either expressed or implied. This case does not come within the exception; for here the property assured was, according to the terms of the conveyance between the assured and Waterman, absolutely conveyed to the latter, and all the official documents proving the ownership of the vessel were in conformity to this conveyance.

But it had been stated in the motion for a new trial, that this was a mere feigned transaction, and that according to a secret trust and bargain between the assured and Waterman, the property was not in truth changed; but merely a lien upon it given to Waterman, to indemnify him against a bond which he had executed for their benefit.

We cannot admit the parties to allege facts, which would prove the conveyance fraudulent, to restore them to the rights which they had lost by the transfer. They might have mortgaged the vessel, if security to Waterman was alone intended. Every document



proves an absolute transfer; and these documents must be conclusive in establishing the property of the vessel between the parties.

But Waterman is in fact, according to the intention of the parties, made the owner of at least one moiety of the vessel by a subsequent transaction; and he does not convey the other moiety back to Carroll, until long after the vessel must have been presumed to be lost; for she sailed from Nova Scotia to some port within the United States, in December, 1801, and this conveyance was not executed until May, 1802. So that at the time the loss took place, Waterman was the sole legal owner of the vessel. He cannot recover, because he is not a party to the contract of insurance; nor has it been assigned to him. And the present plaintiffs cannot recover, because at the time of the loss, they certainly had no legal interest in the property insured; nor can an equitable interest be proved, without utterly destroying the character of their own conveyance to Waterman.

Costs for the defendants.

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JEREMIAH CARPENTER, PLAINTIFF IN ERROR, *v.* THE PROVIDENCE WASHINGTON INSURANCE COMPANY, DEFENDANTS IN ERROR.

In the Supreme Court of the United States.

JANUARY TERM, 1842.

[REPORTED, 16 PETERS, 495-512.]

*The policy of insurance upon which suit was brought, was effected by the plaintiff in error at the office of the Washington Insurance Company, the defendants in error, and below, and contained, inter alia, the following clauses and provisos: "Provided, that in case the insured shall have already any insurance on the property, not notified to the insurers, and mentioned in or endorsed in the policy, then this insurance shall be void and of no effect." "And if the said insured, or his assigns, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to the insurers, and have the same endorsed on the policy, or otherwise acknowledged by them in writing, the policy shall cease and be of no further effect." "Notice of all previous insu-*

rances upon property insured by this company, shall be given to them, and endorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company, shall be of no effect." Held that the policy was avoided under these clauses, by the previous existence, and subsequent renewal, of another insurance, which was not mentioned in, or endorsed on the policy, nor otherwise acknowledged by the defendants in writing, although such other insurance was effected by the plaintiff, for the benefit and protection of a mortgagee of the insured premises, and contained clauses making it assignable, and payable to him, and although it was voidable and had been avoided on the ground of misrepresentation.

When the policy contains provisions such as those above set forth, notice must be given of other insurances, even when they are voidable for intrinsic or other defects, and the fact of such notice must be proved by the written acknowledgment of the insurers, and cannot be proved by parol.

The insurable interest of a mortgagor and mortgagee, differ essentially; the one arising out of the debt secured by the mortgage, the other out of the ownership of the property insured, and the intention of the mortgagor that an insurance effected by him shall enure for the protection of the mortgagee, even when followed by an assignment of the policy to the latter, does not alter the nature of the contract, nor make it an insurance of the debt instead of the property.

A limited, or indirect interest, may be covered by general words of insurance; but in the case of insurances against fire, if the interest intended to be covered be indirect, and not the absolute ownership, its nature and character must in general be communicated to the insurer.

Mr. Justice STORY delivered the opinion of the Court.\*

This is a writ of error to the Circuit Court for the district of Rhode Island. The original action was brought by Carpenter, the plaintiff in error, against the Providence Washington Insurance Company, the defendants in error, upon a policy of insurance underwritten by the insurance company, of fifteen thousand dollars, "on the Glenco Cotton Factory, in the State of New York," owned by Carpenter, against loss or damage by fire. The policy was dated on the 27th of September, 1838, and was to endure for one year. Among other clauses in the policy are the fol-

\*The syllabus and statement of the reporter are omitted.

lowing: "And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or endorsed upon the policy, then this insurance shall be void and of no effect." "And if the said insured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage than the amount hereby insured shall bear to the whole amount insured on the said property." "The interest of the insured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall henceforth be void and of no effect." Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: "Notice of all previous insurances upon property insured by this company shall be given to them, and endorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect."

The declaration averred that during the continuance of the policy, he, Carpenter, was the owner of the property by the policy insured, and was interested in said property to the whole amount so insured by the company; and that on the 9th of April, 1839, the factory was totally destroyed by fire, of which the company had due notice and proof. The cause came up for trial upon the general issue, and a verdict was found for the defendants. The plaintiff took a bill of exceptions to certain instructions refused, and other instructions given by the court in certain matters of law arising out of the facts in proof at the trial; and judgment having been given upon the verdict for the defendants, the present writ of error has been brought to ascertain the validity of these exceptions.

The facts which were in proof at the trial were very compli-

cated ; but those which are material to the present inquiry will be, as briefly as they may be, here stated. The premises were originally owned in equal moieties by Egbert and Epenetus Reed. In June, 1835, Epenetus Reed conveyed his moiety to H. M. Wheeler, who gave a bond and mortgage on the premises, to secure eight thousand dollars of the purchase money to Epenetus Reed. On the 17th of October, 1836, Egbert Reed sold his moiety of the premises to Samuel G. Wheeler, and the latter thereupon gave a bond and mortgage for the sum of ten thousand dollars (the purchase money), to Epenetus Reed ; and on the same day, he, Wheeler, made an additional agreement under seal with Epenetus Reed, by which he covenanted that he would effect a policy of insurance upon the property in the name of himself, or of himself and Henry M. Wheeler, for the sum of at least ten thousand dollars, and assign the same to him, Reed, as a collateral security to the said last bond and mortgage, and would annually renew the policy, or effect a new one, and keep each assigned to Reed as security, in such way and manner as that the said property shall be insured for at least the sum of ten thousand dollars, and the policy held by him as collateral security as aforesaid : and if he neglected so to insure and assign for the space of ten days, then, that Reed might do the same at the expense of Wheeler, and add the premium which he might be compelled to pay, with interest thereon, to his said bond and mortgage, and to collect the same therewith, or that Wheeler would pay the same to him in such other way as he might desire.

From the 17th of October, 1836, to the 6th of December, 1837, Henry M. Wheeler and Samuel G. Wheeler continued to own the factory in equal moieties, and transacted business under the firm of Henry M. Wheeler & Company. On that day Samuel G. Wheeler sold his moiety to Jeremiah Carpenter. On the 18th of April, 1838, Henry M. Wheeler sold and conveyed his moiety to Carpenter, who thus became the sole owner of the entire property. The last conveyance declared the property subject to a mortgage on the premises from Henry M. Wheeler and wife, dated in June, 1835, to Epenetus Reed, on which there was then due six thousand dollars, which Carpenter assumed to pay. There had been a prior policy on the premises in the Washington Insurance office, which, upon Carpenter's becoming the sole owner, the company agreed to continue for account of Carpenter, and in case of loss the amount to be paid to him. That policy expired on the

27th of September, 1838, the day on which the policy, upon which the present suit is brought, was effected.

It is proper further to state, that other policies on the same factory had been effected and renewed from time to time, from December 12th, 1836, for the benefit of the successive owners thereof, by another insurance company in Providence, called the American Insurance Company; and among these was a policy effected by way of renewal on the 14th of December, 1837, in the name of Henry M. Wheeler & Company, for six thousand dollars, for the benefit of Henry M. Wheeler and Carpenter (who were then the joint owners thereof), payable in case of loss, to Epenetus Reed. The sale by Henry M. Wheeler to Carpenter, on the 18th of April, 1838, of his moiety, having been notified to the American Insurance Company, the latter agreed to the assignment; and the policy thenceforth became a policy for Carpenter, payable, in case of loss, to Epenetus Reed. The policy thus effected on the 14th of December, 1837, was (as the Washington Insurance Company assert) not notified to them at the time of effecting the policy made on the 27th of September following, and declared upon in the present suit; nor was the same ever mentioned in, or endorsed upon the same policy; and upon this account the company insist that the present policy is, pursuant to the stipulations contained therein, utterly void.

Subsequently, viz., on the 11th of December, 1838, the American Insurance Company, renewed the policy of 14th December, 1837, for Carpenter; and at his request, for one year. This renewed policy was never notified to the Washington Insurance Company, nor acknowledged by them in writing; nor does it appear ever to have been actually assigned to Epenetus Reed, down to the period of the loss of the factory by fire. On this account also, the Washington Insurance Company insist that their policy of the previous 27th of September, 1838, is, according to the stipulations therein contained, utterly void.

It seems to have been admitted, although not directly proved, that a suit was brought upon the policy of the 14th of December, 1837, at the American Insurance office, after the loss, by Carpenter, as trustee of, or for the benefit of Reed, for the amount of the six thousand dollars insured thereby; and that at the November term, 1839, of the Circuit Court, the company set up as a defence, that there was a material misrepresentation of the cost and value of the property in the factory insured, made to them

at the time of the original insurance; and it being intimated by the court, that if such was the fact it would avoid the policy, the plaintiff acquiesced in that decision, and discontinued or withdrew the action before verdict.

The instructions prayed and refused, and also the instructions actually given by the court, are fully set forth in the record. It does not seem important to the opinion which we are to pronounce, to recite them at large, in *totidem verbis*; since the points on which they turn admit of a simple and exact exposition.

The first instruction asked the court in effect, to say, that the original policy of the American Insurance Company, made in December, 1836, and the several renewals thereof, although made in the name of the Wheelers (the mortgagors), being in fact for the use and benefit of Epenetus Reed, the mortgagee, were for all substantial purposes the policy of Reed, and could never enure to the benefit of the Wheelers, or to Carpenter; and that neither the Wheelers nor Carpenter had any such interest therein as rendered it incumbent on them to give any notice of its existence to the Washington Insurance Company; and that it was, to all intents and purposes, as if Reed had effected the said policy in his own name upon his specific interest as mortgagee. This instruction the court refused to give; and, on the contrary, instructed the jury that, as by the memorandum made on that policy on the 14th of December, 1837, the policy was, by the consent of all the parties interested therein, and of Carpenter, to be for the benefit of Carpenter, he, Carpenter, became interested therein legally or equitably; and that notwithstanding the assignment thereof by the Wheelers to Carpenter, and of Carpenter to Reed, the policy and renewals thereof ought to have been notified to the Washington Insurance Company, at the time when the policy declared on was underwritten, if the policy was then a subsisting policy, and was so treated by Carpenter, and the American Insurance Company; and Carpenter had a legal or equitable interest therein, and was entitled to the benefit thereof.

The question then, is here broadly presented, whether the policy of the American Insurance Company is, under all the circumstances, to be treated as a policy exclusively, for Reed, the mortgagee, or whether it is to be treated as a policy on the property of, and for the benefit of, the mortgagors. No doubt can exist, that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this

important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of debt to the mortgagee, if it does not exceed the insurance. But then upon such payment the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances; for the payment of the insurance by the underwriters, does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor.

Far different is the case where an insurance is made by the mortgagor on the premises on his own account; for, notwithstanding any mortgage or other encumbrance upon the premises, he will be entitled to recover the full amount of his loss, not exceeding the insurance; since the whole loss is his own, and he remains personally liable to the mortgage or other encumbrances, for the full amount of the debt or encumbrance.

These principles we take to be unquestionable, and the necessary result of the doctrines of law applicable to insurances by the mortgagor and the mortgagee. If, then, a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity), as a collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein; and then a loss should occur, no recovery can be had, therefor, against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in

the policy. Another essential difference between the case of a mortgagor and that of a mortgagee (which has been already hinted at), is, that the latter can insure for himself, at most, only to the extent of his debt, whereas the mortgagor can insure to the full value of the property, notwithstanding any encumbrances thereon, for the reasons already stated.

Some of these principles are completely illustrated by the terms of this very policy of the American Insurance Company: and the like clauses are to be found in the policies of the Washington Insurance Company, now under consideration. Thus, although it is expressly provided, "that the assured may assign this policy to Epenetus Reed," yet it is at the same time provided, that "the interest of the assured in this policy is not assignable unless by the consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." Now, the interest here last spoken of, manifestly is the interest of the owner in the premises insured, and not merely his interest in the policy.

But independently of any special clause of this sort, it is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance, and at the time of the loss. It is the property of the insured, and this alone, that is designed to be covered; and when he parts with his title to the property, he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor; as to the grantee of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property, or an incident thereto. This doctrine was laid down in very expressive terms by Lord Chancellor King, so long ago as in the case of *Lynch v. Danzell*, 4 Bro. Parl. Rep. 432, edit. Turb. 2 Marsh. Insur. b. 4, ch. 4, 803, which was an insurance against fire. "These policies," said he, "are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same as incident thereto by any conveyance or assignment, but they are only special agreements with the persons insuring against loss or damages they may sustain. The party



insured must have a property at the time of the loss, or he can sustain no loss, and consequently, can be entitled to no satisfaction." "These policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office." Now this case is the stronger, because it was a case where not only the policy, but the premises, had been assigned to the very parties who sought the benefit of the insurance. The same doctrine was asserted by Lord Hardwicke, in the case of the *Sadlers' Company v. Badcock*, 2 Atk. 554, where there had been an assignment of the policy, after the insured ceased to have any interest in the premises; upon that occasion Lord Hardwicke said: "I am of opinion [that] the insured should have an interest or property at the time of the insuring, and at the time the fire happens." "The society are to make satisfaction in case of any loss by fires. To whom or for what loss are they to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and, therefore, must mean insuring the person from damage;" and he cited, with approbation, the very language of Lord King, already stated in *Lynch v. Danzell*. The authority of these cases was fully recognized and acted upon by this court, in the case of *The Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters, 507, 512, where the court said: "We know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy unwritten for the mortgagor, on the mortgaged premises, in case of a loss by fire. It is not attached to an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

For these reasons it is apparent that Epenetus Reed, as mortgagee, and merely in that character, can have no interest in or right to the policy in the American office, now under consideration. The insurance is not made by him, or in his name, or upon his account. The policy was originally made in December, 1836, for Henry M. Wheeler & Company, who were then the owners of the factory; and by its very terms it is an insurance for them against loss or damage by fire. When the policy was renewed in December, 1837, it was so renewed for the benefit of Henry M. Wheeler and Jeremiah Carpenter, who had then become the joint owners thereof.

When, subsequently, in April, 1838, Carpenter became the sole owner of the premises, the company agreed to the transfer and assignment of the entirety to Carpenter, so that henceforth it became a policy upon his sole property, for his account and benefit ; in the same manner and with the same legal effect as if the policy had been renewed in his own name.

But it is said that there is a clause in the original policy—and it is equally applicable to the renewals—“that the assured may assign this policy to Epenetus Reed.” And the argument is, that this liberty to assign, when the assignment to Reed was actually executed, transferred the whole interest in the property insured, as well as in the policy to Reed, and made the policy to all intents and purposes, a policy for the sole benefit of Reed, as mortgagee, as much as if the insurance had been made in his own name.

To this suggestion several answers may be made, each of which is equally fatal to the construction contended for. In the first place, although an assignment to Reed was authorized by the policy, it was never disclosed to the American Insurance Company for what purposes or objects the assignment was to be made, whether to Reed as trustee, or agent of the insured, or for fugitive and temporary purposes, or as security for debts, or whether it was designed to be absolute and unconditional. Neither was it disclosed to the company, that Reed was in point of fact, a mortgagee ; nor were the company requested to insure his interest, as mortgagee, or to make the insurance exclusively upon his interest and for his account. Now, as it has been already seen, an insurance for a mortgagor, and one for a mortgagee, involve very different considerations, responsibilities, rights and duties ; and the company might well be willing to make an insurance upon the property on account of the mortgagors, when they might be unwilling to make any on account of the mortgagee ; and it is clear, upon principle, that no policy can or ought to be deemed a policy exclusively upon the interest of the mortgagee, unless the company have notice that it is so designed, that they assent to it. A mortgage interest is, without doubt, an insurable interest ; but then it is a special interest, and should be made known to the underwriters. Mr. Marshall, in his “Treatise on Insurance against Fire,” says : “It is not necessary, however, in all cases, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor, an agent,

with the custody of goods to be sold upon commission, may insure; but with this caution, that the nature of the property be distinctly specified." 2 Marsh. Insur. b. 4, ch. 2, p. 789. This language was quoted with approbation by this court, in the case of the Columbian Insurance Company v. Lawrence, 2 Peters, 25, 49, and the reason for it is there given by the court. "Generally speaking," said the court, "insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles, as on the interest of the assured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss." Now, since there is no pretence to say, that the interest of Reed as mortgagee was disclosed to the company, or that the company agreed to insure his interest as mortgagee, and that only, it would seem to follow, that the policy cannot be construed to operate in the manner propounded by the instruction prayed by the plaintiff.

In the next place, the policy itself, upon its very terms, admits of no such interpretation; and indeed requires a different interpretation to give due effect to those terms. The policy, as has been already stated, is in the name of the owners, and for their account, and on their property. If it was designed solely for Reed, why was he not named, and he alone named as the insured? How can any court be at liberty, without other explanatory words, to construe a policy by A. in his own name, on his property, to be not a policy on his own interest, but on the interest of B., who is a stranger to the policy? The language of Lord King and Lord Hardwicke, and of this court, in the cases already cited, show conclusively, that policies of this sort are not deemed, in their nature, incidents to the property insured, but that they are mere special agreements with the persons insuring against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest, as grantee, or mortgagee, or creditor, or otherwise, may sustain, by reason of a subsequent destruction thereof by fire. It would seem, then, repugnant to the terms of this policy to construe it to be not what it purports to be, an

insurance for the owner of the property, but an insurance for an undisclosed creditor or mortgagee. It would materially change the language, the objects, and the obligation of the parties thereto.

In the next place, it would in our judgment, be inconsistent with the manifest intention, as well of the insured, as of Reed, to give such an interpretation. The agreement between Samuel G. Wheeler and Reed, on the 17th of October, 1836, demonstrates in the clearest manner, that the policy was to be effected by the Wheelers, as owners, and to be assigned after it was effected, by them to Reed, as collateral security for his bond and mortgage; and it was only upon their neglect to procure such insurance and assign the policy, that Reed was to be at liberty to do the same at their expense. The language of the instrument is: "I do hereby agree with Epenetus Reed, &c., that I will effect a policy of insurance upon the said property, in the name of myself, or of myself and Henry M. Wheeler, for the sum of at least ten thousand dollars, and assign the same to him as collateral security to said bond and mortgage; and that I will annually renew the said policy, or effect a new one, and keep each assigned to him as security, &c., and the policy held by him as collateral security; and if I neglect so to insure and assign for the space of ten days, then, that said Reed may do the same at my expense," &c. Now, language more direct than this can scarcely be imagined to express the intentions of the parties, that the insurance was to be made in the name of the owners, upon their interest in the property, and for their account, and the policy to be assigned as collateral security to Reed. Not one word is said that the insurance was to be solely and exclusively for Reed, as mortgagee; for in such a case he would hold the policy as a principal, and not as a collateral security. It is obvious from the language also, that Reed was not to be the absolute owner of the policy, as he would be, if made for him exclusively as mortgagee, but he was to hold it as a collateral security. If, then, the debt of Reed should be paid or extinguished in whole or in part, would not the right of the owners correspondently attach to the policy? If the whole debt was paid, would they not be entitled to a reassignment thereof? Yet, unless in such a case the policy attached to the property for their own account and benefit, the reassignment would be a mere nullity. To us it seems beyond all reasonable doubt, that the policy under this agreement was designed by the parties to be on account of the owners and for their benefit, and that it was to be only collat-

eral security to Reed, to the extent of any interest he might have therein in case of loss by fire. In this view it operated as a security to the owners against the entire loss. In any other view, they would only change their creditors upon any loss, from Reed to the underwriters.

Besides, in point of fact, the policy must have its effect and operation from the time of its execution, and not otherwise. The language of the policy is, "that the assured may assign this policy to Epenetus Reed;" not that this policy shall now be for Epenetus Reed, or on his interest. The owners, then had an option, whether to assign or not. If they never had assigned the policy to Reed at all, and a loss had occurred, would not the loss have been payable to the owners? In point of fact, the policy, although made on the 12th of December, 1836, was not assigned to Reed until the 21st of January, 1837. In whom did the interest then originally, and in the intermediate time, vest, under the policy? Clearly in the owners, for they, and they only had an interest in the property or the policy, until the assignment was made. The authorities all hold that the party insured must have an interest at the time of the making of the policy, as well as at the time of the loss; and if Reed had no interest upon which the policy would attach, by its terms, when the insurance was made, but acquired it afterwards, and the policy had been made upon his sole account, it would have been a mere nullity. The subsequent renewals were to the same effect, and for the same purposes and parties, as the original policy. Carpenter, after he became sole owner, did not assign the policy to Reed until the 23d of May, 1838, more than five months after the renewal, and more than one month after the conveyance of the whole property to himself. Now, the question may be here again asked, whether, if the loss had occurred before these assignments, a recovery upon the policy might not have been had by Carpenter in his own name, and for his own account? We think that the question must be answered in the affirmative; and if so, then it demonstrates that the policy made in the name of the owners, was for their account and benefit; and payment only was, in case of loss, to be made to Reed.

For these reasons, we are of opinion that the first instruction asked of the court, was rightly refused; and that the instruction given was entirely correct.

The second instruction asked, proceeds upon the ground that although the policy of the American Insurance Company, of the

6th of December, 1836, was good upon its face, yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was to be deemed utterly null and void, and therefore as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared on. The court refused to give the instruction; and, on the contrary, instructed the jury, that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance office was made, treated by all the parties thereto as a subsisting and valid policy, and had never, in fact, been avoided; but was still held by the assured as valid; then that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void.

We are of opinion that the instruction, as asked, was properly refused; and that given, was correct. It is not true, that because a policy is procured by a misrepresentation of material facts, it is therefore to be treated, in the sense of the law, as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters, upon due proof of the facts; but until so avoided, it must be treated, for all practicable purposes, as a subsisting policy. In this very case the policy has never, to this very day, been avoided, or surrendered to the company. It is still held by the assured; and he may, if he pleases, bring an action thereon to-morrow; and unless the underwriters should, at the trial, prove the misrepresentation, he will be entitled to recover. But the question is not, how the policy may now be treated by the parties, but how was it treated by them at the time when the the policy declared on was made? It was then a subsisting policy, treated by all parties as valid, and supposed by the underwriters to be so. The misrepresentation does not then seem to have been known to the American Insurance Company. It was an extrinsic fact; and if known to the American Insurance Company, it certainly was not known to the Washington Insurance Company. How were the latter to arrive at any knowledge of the facts of misrepresentation; and how were they to avail themselves of the fact, if the American Insurance Company should not choose to insist upon it? Nor is it immaterial in the present case, as was suggested at the bar, that the present plaintiff now seeks to avail himself of his own misrepresentation, or

that of those under whom he claims, to protect against his own laches, in not giving notice of the policy of the underwriters. And it may well be doubted, whether a party to a policy can be allowed to set up his own misrepresentations, to avoid the obligations deducible from his own contract. Be this as it may, it is in our judgment free from all reasonable doubt, that notice of a voidable policy must be given to the underwriters; for such a case falls within the words and the meaning of the stipulations in the policy. It is a prior policy, and it has a legal existence until avoided.

Indeed, we are not prepared to say that the court might not have gone farther, and have held that a policy—existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to any extrinsic facts—should have been notified to the underwriters; even although by proofs, afforded by such extrinsic facts, it might be held in its very origin and concoction a nullity. And this leads us to say a few words upon the nature and importance, and sound policy of the clauses in fire policies, respecting notice of prior and subsequent policies. They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all, or for what premiums; and to ascertain whether there still remains any such substantial interest of the insured in the premises insured, as will guaranty on his part, vigilance, care, and strenuous exertions to preserve the property. To quote the language of this court in the passage already cited, “the underwriters do not rely so much upon the principles as upon the interest of the assured.” Besides, in these policies there is an express provision that in cases of any prior or subsequent insurances, the underwriters are to be liable only for a ratable proportion of the loss or damage as the amount insured by them bears to the whole amount insured thereon. So that it constitutes a very important ingredient in ascertaining the amount which they are liable to contribute towards any loss; and whether there be any other insurance or not upon the property, it is a fact perfectly known to the insured, and not easily or ordinarily within the means of knowledge of the underwriters. The public, too, have an interest in maintaining the validity of these clauses, and giving them full effect and operation. They have a tendency to keep premiums down to the lowest rates, and to uphold institu-

tions of this sort, so essential in the present state of the country for the protection of the vast interests embarked in manufactures, and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases by ordinary good faith, and ordinary diligence on the part of the insured, the effect will be to discourage the establishment of fire insurance companies, or to restrict the operations to cases where the parties and the premiums are within the personal observation and knowledge of the underwriters. Such a course would necessarily have a tendency to enhance premiums; and to make it difficult to obtain insurances, where the parties live or the property is situate, at a distance from the place where the insurance is sought.

But be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, and, upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for these stipulations, would not have been entered into. We are then of opinion, that there is no error in the second instruction. On the contrary, there is strong ground to contend that the stipulations in the policy as to notice of any prior and subsequent policies, were designed to apply to all cases, of policies then existing in point of fact; without any inquiry into their original validity and effect, or whether they might be void or voidable.

We have not thought it necessary, upon this occasion, to go into an examination of the cases cited from the New York and Massachusetts Reports, either upon this last point, or upon the former point. The decisions in those cases are certainly open to some of the grave doubts and difficulties suggested at the bar, as to their true bearing and results. The circumstances, however, attending them, are distinguishable from those of the case now before us, and they certainly cannot be admitted to govern it. The questions under our consideration, are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regu-



lated by any local policy or customs. Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment.

The third instruction prayed the court to instruct the jury, if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that "was, in law, a compliance with the terms of the policy." The court refused to give the instruction as prayed; but instructed the jury that, at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or endorsed upon the policy; otherwise the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said, that the stipulation in the policy is complied with, when there has been no such mention or endorsement as it positively requires; and without which it declares the policy to be henceforth void and of no effect.

The fourth and last instruction given by the court, stands upon the same considerations as those already mentioned; and it would be a useless task to repeat them. If the other instructions given by the court were correct, it is admitted that this cannot be deemed erroneous.

Upon the whole, our opinion is, that the judgment of the Circuit Court ought to be affirmed, with costs.

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It is well established in accordance with *Carroll v. The Marine Ins. Co.*, that a sale or transfer of the property insured, will deprive the vendor of all interest in the policy without conferring the right to enforce it on the purchaser, who can claim nothing under a contract to

which he is a stranger, and which was not made with a view to his benefit or protection (ante) 819. This was decided at an early period, with reference to insurances against fire; *The Saddlers' Co. v. Badcock*, 2 Atkyns, 554; *Lynch v. Dalzell*, 3 Brown's Parl. Cases, 479; *Wilson v. Hill*, 3 Metcalf, 66; *The Dodman M. Co. v. The Worcester M. F. Ins. Co.*, 11 Id. 492; *Carpenter v. The Washington Ins. Co.*, 16 Peters, 495; *Hitchcock v. The State Ins. Co.*, 26 New York, 68; and is equally well settled where marine insurances are in question. *Powles v. Innes*, 11 M. & W. 10; *Winturn v. The Manufacturers' Ins. Co.*, 10 Gray, 501, 506. The reasons on which this course of decision is founded, were stated with great clearness in *Lynch v. Dalzell*, by Lord King, in giving judgment for the insurers, where he said, that the express words and plain intent of the policy confined the right of indemnity, to such losses as were sustained by the person who effected the insurance, and that he could not be injured by the destruction of the property after he parted with the estate or title, which constituted his interest in its preservation: while Lord Hardwicke held, in *The Saddlers' Company v. Badcock*, that, as there was no possibility of insuring the thing, the insurance was necessarily personal, and would not follow the property to remaindermen or reversioners. The same principle was applied in *Hamilton v. Baldwin*, 19 English Law & Eq. 283, to life insurances, and a policy on the life of a debtor, held not to pass as an incident to a bequest of the debt.

If this rule prevailed without qualification, no recovery could be had after a sale which deprived the insured of all interest in the preservation of the property, and precluded the possibility of his being injured by its destruction, whether the suit was brought for his benefit or for that of the vendee; while strict logic would seem to require that the bar arising under these circumstances, should be superior to the intention of the parties to the sale, and to every thing short of a new contract between the purchaser and the insurer. Custom and convenience have, however, established the right of the holder of a marine policy, to determine whether it shall be defeated by a sale, or subsist for the benefit of the purchaser. This is clearly shown by the language of the court in *Powles v. Innes*, as well as by the cases of *Wakefield v. Martin*, 3 Mass. 558, and *Earl v. Shaw*, 1 Johnson's Cases, 313, where the purchaser was held entitled to sue in the name of the vendor, on proof the sale was accompanied by an assignment of the insurance; while in *Sparkes v. Marshall*, 2 Bing. N. C. 76, Tindal, C. J., went so far as to say, that a change in the ownership would not discharge the insurers, because the insured might still recover for the benefit of the person to whom the property was transferred. But the subsequent case of *Powles v. Innes*, 11 M. & W. 10, overruled this dictum, by deciding that no recovery could be had against the insurers,

for a loss subsequent to the sale of the property insured, without proof that the vendor meant the policy to remain open for the protection of the purchaser, which might appear from his acts or declarations, but could not be inferred, in the absence of proof; and thus brought the English law to the same point which had been previously reached in this country, in *Carroll v. The Boston Marine Ins. Co.*

Emerigon cites a similar decision by the Grand Council of Amsterdam, in which it was held that the policy became inoperative as soon as the property was sold, unless it was expressly mentioned in the contract of sale, or in some other way transferred to the purchaser. But he questioned the propriety of this judgment on grounds which, if the question were still open, might be unanswerable, and agreed with Chief Justice Tindal, in thinking that an insurance is a mere accessory, which should pass with the assignment of the principal, unless the parties manifest an opposite intention. Emerigon, chap. xvi., sect 3. If the point were open, much might be said in favor of this view of the law, as compared with that taken in the United States and England: The question is admitted to depend solely on intention; the vendor has full power to make the transfer; and cannot reasonably be supposed to have reserved what can be of no further use to him, and may be of the utmost importance to the purchaser? This argument is held to be decisive, in favor of the right of an assignee of a debt to all the securities held for its payment, and would seem to apply with at least equal force, to a transfer of the property covered by a policy of insurance.

It was said in *Carroll v. The Marine Ins. Co.* (ante, 864), that the only exception to the rule that a sale avoids the insurance, is where the policy is assigned with notice to the insurers, and with their express or implied approbation. But this doctrine is at variance with the authorities which establish, that the right to transfer the benefit of a marine policy to a purchaser of the property, is given impliedly by the policy itself, and may be exercised without the knowledge or concurrence of the insurers. Park on Insurance, 597, 598; 2 Arnould on Insurance, 1334; 1 Phillips on Insurance, 34; *Powles v. Innes*, 11 M. & W. 10; *Delaney v. Stoddart*, 1 Term, 22; *Wakefield v. Martin*, 3 Mass. 558; *Watson v. Swann*, 11 C. B., N. S. 756, 772; *Hitchcock v. The New York Ins. Co.*, 26 New York, 68; *Earl v. Shaw*, 1 Johnson's Case, 313. Thus, *Wakefield v. Martin* and *Earl v. Shaw*, show that the policy may be assigned without giving notice to the insurers, or obtaining their consent to the transfer; while *Powles v. Innes* and *Delaney v. Stoddart*, indicate with equal clearness, that the question turns on the understanding or intention of the parties to the sale.

It is therefore plain, that a marine policy has a somewhat wider scope

than that which is generally attributed to it, and extends beyond the person by whom it is effected, to all who derive title from him subsequently, by a purchase which includes the insurance, as well as the property. For, if the contract were simply to indemnify the insured, it would become inoperative, if not void, as soon as he parted with his interest, and the assignment to the vendee would be worthless, because there would be nothing to assign. But if the engagement of the insurers is viewed as being that, when the property is sold, and the policy ceases to be necessary for the protection of the person first insured, he may still hold and enforce it as a trustee for the purchaser, all difficulty will disappear, and the cases may be reconciled with each other, and with principle. *Watson v. Swann*, 11 C. B., N. S. 756, 772. There is nothing exceptional in this construction, or that does not apply to an ordinary guaranty of a debt or bond, which, though made to one man, may be enforced by a suit in his name for the benefit of another, to whom he subsequently transfers the contract guarantied (ante, 359). These remarks are equally applicable to fire policies, except that the transaction must be communicated to the insurers, and their assent obtained to the transfer of the insurance.

The transfer need not be express, but may be implied from facts and circumstances indicating that the vendor means to keep the policy open for the benefit of the purchaser. See *Powles v. Innes*; *Hitchcock v. The Insurance Co.*, 26 New York, 68. In *Martin v. The Manufacturers' Ins. Co.*, 10 Gray, 501, however, a written order directing the proceeds to be paid to the purchaser in the event of loss, was held not to be such an assignment as would entitle him to the benefit of the insurance, although he paid the premium and took a receipt from the insurers with a full knowledge on their part of the sale. But this decision can hardly be sustained either on general grounds or under the principles stated by the court.

The rule is, however, so far different when insurances against fire are in question, that the assent of the insurers must be obtained and is essential to entitle the assignee to the protection of the insurance. *Hitchcock v. The New York Ins. Co.*, 26 New York, 68; Angell on Fire and Life Insurance, sect. 109. It might be difficult to find a sufficient reason for this distinction; but it has been said to result from the confidence reposed in the character and habits of the insured, and the consequent right of the insurers to determine whether their responsibility shall endure after the property has passed into other hands. The point can hardly be said to have arisen in *Lynch v. Dalzell* and *The Saddlers' Co. v. Badcock*, because the assignment was not made until after the loss; but the dicta of Lord King, as cited and adopted by Lord Hardwicke, are express to the point, that insurers are only liable to the parties with whom they contract, and are not bound to indemnify

third persons for the loss of the property covered by the insurance. *Carpenter v. The Washington Ins. Co.* (ante).

When, however, the insurers have once agreed that the policy shall remain open notwithstanding the sale, the difference between fire and marine insurances is at an end, and the purchaser will have the same right to indemnity against subsequent loss, as if the contract had been made expressly for his benefit. Such a transfer gives rise to an obligation in favor of the assignee, which, though growing out of the original contract, derives an additional sanction from the assent of the insurers, and cannot be defeated by a subsequent default or breach of the condition on the part of the assignor. *Tillou v. The Kingston Marine Ins. Co.*, 7 Barb. 590; 1 Selden, 405; *The Charleston Ins. Co. v. Neve*, 2 McMullin, 237; *The Traders' Ins. Co. v. Roberts*, 9 Wend. 404; 17 Id. 631.

This is generally conceded where the sale is absolute, and by passing all the right and title of the vendor, renders him as much a stranger in interest to the contract, as if he were not a party to its terms. See *The City Fire Ins. Co. v. Mark*, 45 Illinois, 482; *The Buffalo Steam Engine Works v. The Sun M. F. Ins. Co.*, 17 New York, 401; *Hale v. The Mechanics' M. F. Ins. Co.*, 6 Gray, 169. There is, accordingly, no case establishing that a purchaser, who has paid in full and taken an assignment of the policy with the assent of the insurers, can lose the right to indemnity through an act or omission of the vendor which he does not share. Assent to the assignment of a contract does not ordinarily preclude the assertion of any defence which is not fraudulently concealed from the assignee; 2 Smith's Ldg. Cases, 751, 6 Am. ed.; and will not, therefore, estop the party by whom it is given from taking advantage of a subsequent default or failure of consideration. The assignee takes the contract as it is, and cannot recover if it is avoided by the laches or non-feasance of the assignor. This is always true of a mere transfer or assignment, not necessarily so when the assignee becomes in effect a party to the contract, claiming in his own right and not through the assignor. There is an obvious difference between the transfer of the policy to a stranger, which simply passes a right to whatever might or could be recovered by the assignor, and an assignment to a vendee intended to protect the interest conferred by the sale, and consequently entitling him to recover, notwithstanding, the cessation of the insurable interest of the person under whom he claims. If this be true in the case of an absolute sale, it should be equally so in that of a mortgage, because a mortgagee is in many respects a purchaser, although a purchaser whose rights are confined within certain limits.

The more recent cases, however, establish that the designation of the mortgagee as the party to whom payment is to be made in the case of loss, or even an assignment of the policy to him with the consent of

the insurers, will not defeat their right to insist upon an exact compliance with the conditions of the contract, or preclude them from relying on a subsequent sale of the equity of redemption, as a defence to a suit brought for the use of the assignee. *Grovenor v. The Atlantic Ins. Co.*, 17 N. Y. 391; *The Buffalo Steam Engine Works v. The Sun Ins. Co.*, 1b. 501; *Bidwell v. The N. W. Ins. Co.*, 19 Id. 179; *The State M. Ins. Co. v. Roberts*, 7 Casey, 438; *Howie v. The Providence Ins. Co.*, 6 R. I. 17; *Hazard v. The Franklin Ins. Co.*, 7 Id. 429; *Buckley v. Garret*, 11 Wright, 204, 209; *Hale v. The Mechanics' Ins. Co.*, 7 Gray, 169; *Loring v. The M. Ins. Co.*, 8 Id. 28; *Lawrence v. The Holyoke Ins. Co.*, 11 Allen, 387; *Pupke v. The Resolution Ins. Co.*, 17 Wisconsin, 378.

In *Bidwell v. The N. W. Ins. Co.*, the court said that the contract remained after the assignment as it was before, an insurance of the interest of the mortgagor, which failed if he sold the premises before the loss or did any act contrary to the provisions of the policy. In *Foster v. The Equitable Ins. Co.*, 8 Cushing, 33; 10 Id. 32, the opinion expressed above by Story (ante), that the assignment of a policy of insurance is like that of any other chose in action, and will confer no right on the assignee that could not be enforced by the assignor, was embraced by the Supreme Court of Massachusetts; and in *Bowditch v. The Mutual Ins. Co.*, 8 Gray, 38 the doctrine was carried to the extent of deciding that the assent of the insurers to an assignment of the policy to a mortgagee or purchaser, will not preclude them from showing that it was invalid when transferred, notwithstanding the equitable rule under which a party who fails to speak at the proper time will be compelled to remain silent afterwards. When, however, the insurers agreed that the policy should "stand good" to the assignee, they were held to be precluded from taking advantage of a prior forfeiture. *Collins v. The Charleston Ins. Co.*, 10 Gray, 155; 2 Smith's Ldg. Cases, 750, 6 Am. ed.

In these instances, however, the policy was expressly conditioned to be void if the property was sold or conveyed by the insured; and it still remains to be decided that a sale by a mortgagor will in the absence of a proviso to that effect, preclude an action in his name on a policy that has been assigned by him to the mortgagee, with the consent of the insurers.

Although the engagement of the insurers is not only to indemnify the insured, but that those who claim under him as purchasers shall also be saved harmless, it is still made solely to and with him, and consequently falls within the rule which limits the right to enforce a contract to the parties, even when the beneficial interest resides in a stranger. Hence a sale of the property, attended by a transfer of the policy to the purchaser, will not enable him to sue in his own name, and the remedy must be sought, as in other cases where choses in

action are transferred, in a suit in the name of the assignor. The rule is established on this basis in England, and has been laid down in numerous instances in the United States. *The New England Ins. Co. v. Wetmore*, 32 Illinois, 221; *Carter v. The United States Ins. Co.*, 1 Johnson's Ch. 463; *The Traders' Ins. Co. v. Roberts*, 9 Wend. 404; *De Bolle v. Pennsylvania Ins. Co.*, 4 Wharton, 58; *Granger v. The Howard Ins. Co.*, 5 Wend. 205; *Jessel v. The Williamsburg Ins. Co.*, 3 Hill, 88; *Conover v. The M. Ins. Co.*, 3 Denio, 254, 1 Comstock, 290; *Flanigan v. The Camden M. F. Ins. Co.*, 1 Dutcher, 507; *Boyles v. The Ins. Co.*, 3 Id. 163; *Folson v. The Belknap M. F. Ins. Co.*, 10 Foster, 321; *Pollard v. The M. F. Ins. Co.*, 42 Maine, 221; *Shepherd v. The Union Ins. Co.*, 38 New Hampshire, 232; *Minturn v. The Manufacturers' Ins. Co.*, 10 Gray, 501, 506. *The New England Ins. Co. v. Wetmore*, 32 Illinois, 221; *Flanigan v. The Camden M. F. Ins. Co.*, 1 Dutcher, 507; *Bayles v. The Ins. Co.*, 3 Id. 163; *Dolson v. The Belknap Ins. Co.*, 10 Foster, 324; *Pollard v. The M. F. Ins. Co.*, 42 Maine, 221; *Shepherd v. The Union Ins. Co.*, 38 New Hampshire, 232. In like manner, the right of action lay with the vendor under the ordinance of Louis XIV., although judgment, when recovered, would enure to the benefit of the vendee. Emerigon, chap. 16, sect. 3. An express promise to the assignee may, no doubt, clothe the equitable interest created by the assignment with the force of a legal obligation; 2 Philips on Insurance, sect. 1974 (ante, 209); but the assent of the insurers does not operate as such a promise, and cannot justly be carried further than the object which the parties have in view, which is to ratify the assignment, and prevent it from operating as a forfeiture.

In *Wilson v. Hill*, 3 Metcalf, 66, however, the Supreme Court of Massachusetts expressed the opinion, that the assignment of a policy of insurance to a purchaser, with the consent of the insurers, creates a new contract between them and the assignee, which may, and indeed must be enforced by a suit in his own name, and without using that of the assignor. "An insurance of buildings against loss by fire," said Shaw, C. J., in delivering the opinion of the court, "although called, in popular language, an insurance of the estate, is in effect a contract of indemnity with an owner, or other person having an interest in the preservation of the buildings as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain, in the case they are destroyed or damaged by fire. If, therefore, the assured has wholly parted with his interest before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured—if he has sustained no damage, the contract is not broken. If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to

the insurer, and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in like manner, whilst he retains an interest in the estate, and the exception of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. But such an undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract. Even the assignment of a chose in action with the consent of the debtor, and a promise on his part to pay the assignee, constitutes a new contract, on which the assignee must sue in his own name."

This argument implies that a purchaser who takes an assignment of the policy may not only sue in his own name, but must declare on a new contract, and not on that made with the person first insured. Such a conclusion would, however, be at variance with the main current of authority which establishes that the assignee claims through and under the assignor, and is subject to every defence that would be good against him (*ante*, 886). *The State M. F. Ins. Co. v. Roberts*, 7 Casey, 438; *Foster v. The Equitable M. Ins. Co.*, 2 Gray, 216, 219. The explanation given in *Wilson v. Hill*, is, moreover, inapplicable to the assignment of a marine policy which does not require the assent of the insurers, and is manifestly a transfer of the old, and not the creation of a new contract. The error seems to have originated in regarding an insurance as an agreement to indemnify the person first insured, on which no recovery can be had unless he is injured. If this were the true interpretation of the policy, it obviously could not be so enlarged by an assignment, as to include losses sustained by third persons. A promise to save A. harmless cannot be enforced by or for the use of B., unless A. is injured, and then only to the extent of the damage undergone by him. If, therefore, the obligation imposed by the insurance of a house or vessel were limited to indemnifying the person by whom or on whose behalf the insurance was effected, it would be a sufficient answer in all cases to say that he had parted with his interest in the property, and could not be affected by the loss. But if the policy be interpreted as a contract for the benefit, not only of the insured, but of those who claim under him subsequently, as purchasers, the necessity for resorting to a new contract will disappear, and there will be no difficulty in adjusting the rights of the parties on their true basis. Thus interpreted, the operation of a policy of insurance would be somewhat analogous to that of the numerous covenants which run with land, and entitle those who claim under the covenantee by descent or purchase, to the full benefit of the stipulations made by the covenantor. For, although the purchaser acquires



a right of action at law in one case, and is confined to a mere equity in the other, the distinction is one of form, rather than of substance, and disappears when the estate sold is an equity of redemption, or falls short in any way of the legal title. 1 Smith's Leading Cases, 159, 6 Am. ed. In both cases the vendor becomes a mere trustee for the vendee, and can do no act to the prejudice of his *cestui que* trust, who acquires the whole beneficial interest in the contract, and has all the rights of an owner, except that of enforcing it, by an action in his own name. *Tillou v. The Kingston M. Ins. Co.*, 7 Barb. 590; 1 Selden, 405; *The Charleston Ins. Co. v. Neve*, 2 McMullin, 237; *The Traders' Ins. Co. v. Roberts*, 9 Wend. 404; 1 Smith's Leading Cases, 166, 182, 6 Am. ed.

It was indeed said in *Foster v. The Equitable Ins. Co.*, 2 Gray, 216, 219, that the assignment of a policy of insurance is like that of any other chose in action, and confers no new or additional right on the assignee. But while this is true, where the assignee is a stranger to the property and merely acquires a right to the fund, it must be taken with some degree of qualification, when the transfer is made to a purchaser of the property and intended for his protection.

Had the views of Emerigon, which seem to have been shared by Chief Justice Tindal (ante, 883), been adopted in this country and in England, the analogy between a policy of insurance and a covenant running with land would have been rendered more complete, by construing the insurance as a mere accessory, passing by a sale of the thing insured, unless excepted or reserved by the vendor. But the purchaser may acquire the full benefit of the insurance, even as the law now stands, by taking an assignment of the policy from the vendor with the assent of the insurers.

It is well settled in accordance with *Carpenter v. The Washington Ins. Co.* (ante), that a clause making the policy payable to a creditor or mortgagee; *Woodbury Bank v. Charter Oak Ins. Co.*, 29 Conn. 394, *Bidwell v. The Northwestern Ins. Co.*, 19 N. Y.; or an order or endorsement directing payment to be made to him in case of loss, does not confer any new or distinct right on the assignee, and simply operates as an equitable assignment, entitling him to the proceeds in case of loss. *Martin v. The Manufacturers' Ins. Co.*, 10 Gray, 501; *Loring v. The Marine Ins. Co.*, 8 Id. 28. Such an appropriation will, therefore, leave the appointee open on the one hand to any defence that would have been valid against the assignor; *Bidwell v. The Northwestern Ins. Co.*, *Hale v. The Mechanics' Ins. Co.*, 6 Gray, 169; *Groovnor v. The Atlantic Ins. Co.*, 17 New York, 391; and will not, on the other, be a breach of a proviso that the policy shall not be assigned without the consent of the insurers. And this interpretation should be put on every transfer which does not purport to pass the insurance as such to the assignee, and

simply authorizes him to demand and receive whatever may become due under the contract, to the assignor. *Cromwell v. Brooklyn Ins. Co.*, 39 Barb. 227; *Shotwell v. The Jefferson Ins. Co.*, 5 Bosworth, 247.

What has been said, may serve to show the difference between a mere assignment of the policy, which gives nothing but a right to such damages as may become due to the assignor, and must necessarily, be subject to every defence which would be good against him, and a transfer of the insurance under, or contemporaneously with a contract of sale, and with a view of entitling the vendee to an indemnity, which is no longer needed for the protection of the vendor. The former is obviously a mere assignment, which leaves the insurance what it was before—an engagement to indemnify the assignor, and on which the assignee cannot recover unless the assignor is injured; the latter enlarges the operation of the contract, or rather brings the vendee within its scope, by rendering it the duty of the insurers to make good any loss which he may sustain by the subsequent destruction of the property insured, in the same manner as if the insurance had been originally effected for his benefit. It is therefore plain, that a mere assignment of the policy, or—to speak more accurately—of the right to receive the compensation which is or may become due, for any loss which befalls the assignor, works no change in the relations between the parties to the insurance, and may be made without the consent or knowledge of the insurers, whether the contract is against loss by fire, or a marine insurance. *Peabody v. The Washington County Ins. Co.*, 20 Barbour, 340; *St. John v. The American Life Ins. Co.*, 21 Id. 31; *Ellis v. Kreutzinger*, 27 Missouri, 311.

Under these circumstances the opinion intimated above by Story, J., and repeated in *Foster v. The Equitable M. F. Ins. Co.*, 2 Gray, 216, 219, that the assignment of a policy, will, like that of any other contract or chose in action, confer no right that could not be enforced by the assignor is strictly true, and if the insurable interest of the assignor fails or is transferred to a third person, the title of the assignee will fail with it, and no recovery can be had in a suit brought for his benefit against the insurers. On the other hand, when the property is sold and the policy transferred with it to the vendee, the loss of insurable interest on the part of the vendor will not be a defence to an action brought on behalf of the purchaser, who will therefore stand nearly, if not quite in the same position as if the insurance had been originally effected for his protection. *Wilson v. Hill*, 3 Metcalf, 66.

It may therefore be inferred, that while a transfer to a stranger in interest, will simply pass the policy as a contract or chose in action, and leave the assignee subject to any defence which would have been good against the assignor, an assignment to a purchaser is governed by a different principle, and may place him beyond the reach of a for-

feiture arising from subsequent acts or defaults, which he does not share. (ante, 885). But a question of more difficulty arises, when the policy is transferred to a mortgagee, whose insurable interest is unquestionable, but differs essentially from the full ownership of the property which the insurance was originally designed to protect. The language of Story, in *Carpenter v. The Washington Ins. Co.*, might induce the conclusion, that an assignment of the policy to a mortgagee, operates merely as an equitable transfer of the right to recover any amount which may become due to the mortgagor, and will consequently not preclude a defence founded on a subsequent sale by the latter.

It is not easy to reconcile this language with the well established doctrine, that an assignment to a purchaser confers a right to the benefit of the insurance as such, which in the case of a marine policy does not require to be ratified or confirmed by the insurers. In the *Traders' Ins. Co. v. Roberts*, 9 Wend. 404, 474; 17 Id. 361, the mortgagee was accordingly held entitled to sue and recover in the name of the mortgagor, on a policy which had been assigned to him by the latter, notwithstanding the failure of the mortgagor to give notice of a subsequent insurance as the terms of the instrument required. The court held that when the policy was transferred to the mortgagee it took effect as if it had been made for his benefit. The obligation of the insurers was thenceforth two-fold, first to indemnify the mortgagee to the extent of the amount due on the bond, and subject to this incumbrance to make good any loss that might be sustained by the mortgagor. These interests were distinct, and either might continue to exist notwithstanding the cessation or forfeiture of the other. The breach of condition on the part of the mortgagor, might have been an answer to a suit brought for his benefit, but it was not a reason for withholding the protection of the policy from the mortgagee. Judgment was accordingly entered in his favor. But the court granted a perpetual stay of execution, on its being made to appear that the mortgage debt had been paid. This order was set aside by the court of errors and appeals, apparently on the ground that the judgment being general could not be restricted by intendment to the interest of the mortgagee. This case was approved or followed in *Tillou v. The Kingston M. Ins. Co.*, 7 Barb. 370; 1 Selden 405; *Conover v. The M. Ins. Co.*, 1 Comstock, 291; and *Allen v. The M. Ins. Co.*, 19 Barb. 442. And the point has been decided in the same way in some of the other States. *New England Ins. Co. v. Wetmore*, 32 Illinois, 221; *Pollard v. The Somerset M. Ins. Co.*, 42 Maine, 221; *The Charleston Ins. Co. v. Le Neve*, 2 McMullin, 237. In *Tillou v. The Kingston M. Ins. Co.*, Foote, J., said, "that the assignment of a policy of insurance with the consent of the insurer creates new and mutual relations and rights between the assignee and the insurer, which on the plainest principles of law and

justice cannot be impaired by the acts of a third party, over whom the injured party has no control." When, however, the point arose in the *Buffalo Steam Engine Works v. The Sun M. Ins. Co.*, 17 New York, 401; *Roberts v. The Trader's Ins. Co.*, was overruled, and a subsequent breach of condition on the part of the mortgagor, held to preclude him from recovering for the use of the mortgagee, to whom the policy had been assigned with the consent of the insurers. This case is sustained by the subsequent decisions in Massachusetts and Pennsylvania; and the main current of authority tends in the same direction. *Borditch Ins. Co. v. Winslow*, 3 Gray, 415; *Hale v. The Mechanic's Ins. Co.*, 6 Gray, 169; *Edes v. The Hamilton Ins. Co.*, 3 Allen, 362; *Lawrence v. The Holyoke Ins. Co.*, 11 Id. 387; *The State M. F. Ins. Co. v. Roberts*, 7 Casey, 438; *Pupke v. The Resolution Ins. Co.*, 17 Wisconsin, 378; *Morsie v. The Providence M. F. Ins. Co.*, 6 Rhode Island, 517.

It is, however, conceded even under this view of the law, that if the premium is paid or guaranteed by the assignee, a new contract will arise which can not be defeated by any subsequent act or default on the part of the assignor. *Foster v. The Equitable M. Ins. Co.*, 2 Gray, 216. On the other hand, in *Martin v. The Manufacturers' Ins. Co.*, 10 Gray, 501, the court held that an order to pay the "within policy" to the purchaser did not make him sufficiently a party in interest, to render a written acknowledgment by the defendants of the subsequent receipt of premium, which was paid on his behalf with a full knowledge on their part, a waiver of a condition that the policy should be void if assigned without the consent in writing of the insurers. Such an order is, however, an unequivocal proof that the parties mean the insurance to continue, notwithstanding the sale, and the defendants could not manifest their assent more distinctly than by accepting the premium and giving a receipt.

Whatever doubt may exist under other circumstances, it would seem to be universally conceded, that the assignment of a policy after a loss operates in the same manner as that of any other contract or chose in action, and simply entitles the assignee to the amount due to the assignor, without enlarging his rights on the one side, or creating a bar to an action brought to enforce them on the other; *Rider v. The Ocean Ins. Co.*, 20 Pick. 257; *Peabody v. The M. Ins. Co.*, 20 Barbour, 339; *Wilson v. Hill*, 3 Metcalf, 60; *Whiting v. The Sun M. Ins. Co.*, 15 Maryland, 297, 313; *Miller v. The Hamilton Ins. Co.*, 5 Duer, 101; 3 Smith, 609, 615; *Carroll v. The Charter Oak Ins. Co.*, 38 Barb., 402; and the same rule must apply to a transfer made before the breach, to an assignee who has no interest in the thing insured; unless a policy of insurance forms an exception to the principles regulating the transfer of other contracts.

The effect of a sale in vacating an insurance, is due to its operation

in divesting the title of the insured. The contract still exists but the property is put beyond the reach of the contract. Or to state the reason of the rule somewhat differently, as the contract is one of indemnity, no recovery can be had unless the plaintiff is injured by the destruction of the property, which cannot happen where he parts with all his estate before the loss. It follows that a conveyance or alienation will not be a defence in any case where the interest of the insured continues to exist, although in another form, and differing essentially from that which he had at the time of effecting the insurance. *Hitchcock v. The Northwest Ins. Co.*, 26 N. Y. 68; *Hill v. The Cumberland Valley Ins. Co.*, 9 P. F. Smith, 474; *Hodges v. The Tennessee M. F. Ins. Co.*, 4 Selden, 416; *Eastman v. The Carroll Ins. Co.*, 45 Maine, 307; *Ayers v. The Hartford Ins. Co.*, 17 Iowa, 176. It is well settled that a grant by way of collateral security or mortgage, works no change in the insurable interest of the grantor and will not invalidate a prior policy. *Ayres v. The Hartford Ins. Co.*, 17 Id. 176; 21 Id. 193; *Shepherd v. The Union M. F. Ins. Co.*, 38 N. Y. 232. Hence a vendor who withholds the legal title or takes a mortgage as a security for the price, may sue and recover for a subsequent loss; although there is not a little difference of opinion whether the judgment should be limited to the unpaid purchase money, or may extend to the value of the property at risk (ante, 830). *Tittlemore v. The V. M. F. Ins. Co.*, 20 Vermont, 546; *Reed v. Cole*, 3 Burrow, 1512; *Norcross v. The Ins. Co.*, 5 Harris, 529; *Vairin v. The Canal Ins. Co.*, 10 Ohio, 323; *Trumbull v. The Portage M. F. Ins. Co.*, 12 Id. 305; *Stetson v. The Mass. F. Ins. Co.*, 4 Mass. 330; *The F. & M. Ins. Co. of Wheeling v. Morrison*, 11 Leigh, 354; *Hitchcock v. The Northwest Ins. Co.*, 26 N. Y. 68; *Morrison v. Tennessee M. F. Ins. Co.*, 18 Missouri, 262; *Washington v. Bearse*, 12 Allen, 332; *The Boston & Salem Ice Co. v. The Royal Ins. Co.*, Ib. 381; *Crofts v. The Union Ins. Co.*, 36 New Hampshire, 44; *Phelps v. The Gebhard F. Ins. Co.*, 9 Bosworth, 404. The principle was applied in another form, in *Lazarus v. The Com. Ins. Co.* (ante, 801); and the resulting trust in favor of the assignor, under a conveyance for the benefit of creditors, held to constitute an interest which survived the grant, and came within the protection of a prior policy. And for a like reason a sale subject to a mortgage, will not defeat a prior insurance, because the mortgagor still retains an interest in the preservation of the premises, as a means of paying the mortgage debt (ante, 821); *Buffalo Steam Engine Works v. The Sun M. F. Ins. Co.*, 17 N. Y. 401; *Walker v. The People F. Ins. Co.*, 19 Id. 184; although the case is obviously different when the conveyance is by the terms of the agreement to be free from incumbrance. The doctrine holds good even when the deed or transfer is absolute on its face, and the real nature of the transaction can only be shown by parol. *Morrison v. The Tennessee M.*

*T. Ins. Co. ; Ayers v. Home Ins. Co.* But the latitude thus given, will not extend to any unfair or corrupt transaction, or authorize a vendor to show that a sale, absolute on its face, was subject to a resulting trust in his favor, intended to put the property beyond the reach of his creditors (ante, 864). *Treadway v. The Hamilton Ins. Co.*, 29 Connecticut, 68. The point was decided in *The Dodman Manufacturing Co. v. The Worcester M. F. Ins. Co.*, 11 Metcalf, 429; and is in accordance with the general rule, that no one can have relief at law or in equity, against the consequences of his own fraudulent or illegal conduct. 1 Smith's Leading Cases, 637, 6 Am. ed.; *Murphy v. Hubert*, 4 Harris, 50.

The interests of tenants in common, or other joint owners of lands and chattels, are as distinct for all the purposes of indemnity against loss, and therefore of insurance, as if they owned different and distinct things; and hence an insurance effected by one, will not serve to protect the share of another; *Burgher v. The Columbia Ins. Co.*, 17 Barbour, 274; *French v. Backhouse*, 5 Burrow, 271; *Foster v. The U. S. Ins. Co.*, 11 Pick. 85; *Holmes v. The United Ins. Co.*, 2 Johnson's Cases, 229; *Murray v. The Col. Ins. Co.*, 11 Johnson, 302; *Finney v. The Warren Ins. Co.*, 1 Metcalf, 16; unless it was made on his behalf, and authorized or ratified by him. *Finney v. The Ins. Co.*, 5 Metcalf, 192 (ante, 577). An insurance effected by a partner in his own name on the property of the firm was held in *The Peoria Ins. Co. v. Hill*, 12 Illinois, 202, to be in the same category; but this is somewhat questionable because a partner has an implied authority to insure for the firm, and may reasonably be presumed to have intended to exercise it, unless the evidence indicates a contrary design. A sale of the share of one partner to another, will consequently preclude either from recovering an indemnity for its subsequent loss, under a policy previously effected by both, by placing the interest thus transferred beyond the reach of the contract with the vendor, without bringing it within that made by the purchaser, which relates to a different estate or right, although in the same house or chattel. And it has been repeatedly held, that a recovery cannot be had under these circumstances, for the loss of the share which has not been conveyed, and which consequently remains in the same state as when the policy was effected. Thus, in *Howard v. The Albany Ins. Co.*, 3 Denio, 301, the majority of the court held, in opposition to the able dissenting opinion of Bronson, J., that an assignment of the interest of one of two tenants in common to another, was a bar to a joint action on a policy of insurance which had been effected in the names of both; and this decision was followed in *Murdock v. The Chenango Ins. Co.*, 2 Comstock, 210; *Tillou v. The Kingston M. Ins. Co.*, 7 Barbour, 570; 1 Selden, 405; and *Dix v. The Marietta Ins. Co.*, 22 Illinois, 272; *Wood v. The Rutland F. Ins. Co.*, 31 Vermont, 552; and *Dreher v. The Aetna Ins. Co.*, 18 Missouri, 128. These cases were

based on the technical ground, that, as those who proceed on a joint contract, rest their claim on a common basis, the failure of one must necessarily involve that of all. And it is undoubtedly true, that no recovery can be had on a joint demand, without proof that the plaintiffs have a common cause of action, which they are entitled to enforce by suit. But it would appear, notwithstanding, that while a policy effected by two joint owners or tenants in common is a joint contract, it is a contract with both to make good any injury which may be sustained by either, in consequence of the destruction of the property insured, and is consequently broken as soon as either is damnified, whether the loss falls solely on him or is shared by the other. Hence, proof that one has sold or parted with his share, instead of operating as a bar, simply goes in mitigation of the damages, which would have been due had no sale occurred. This view is sustained by the case of *Peck v. The New London Ins. Co.*, 22 Conn. 570, where an insurance of real and personal property, effected by two persons jointly, was held binding, although the chattels belonged exclusively to one, and the buildings to the other.

We accordingly find, that in *Powles v. Innes*, 11 M. & W. 10, where a sale by one of two tenants in common, of a vessel, was held to be an answer so far as he was concerned, to an action brought by himself and the other, on an insurance effected in the name of both, the right to an indemnity for the other share, was thought to be so entirely beyond question, that the whole amount claimed was paid into court. In *Hobbs v. The Memphis Ins. Co.*, 1 Sneed, 444, the authority of *Howard v. The Albany Ins. Co.* was accordingly denied, and a sale by one partner to another, said to place the interest thus transferred beyond the reach of a prior insurance by the firm, without impairing the claim of the other partner to be indemnified to the extent of the interest which he had originally held.

And when the question arose subsequently in New York, the withdrawal of a partner or the sale of his interest to the firm, was said to operate as a release which enlarged the estate of the other partners, without placing the share so transferred beyond the policy, or precluding the right to recover for the whole value at risk in case of loss. *Wilson v. The Genesee Ins. Co.*, 16 Barb. 511; *Day v. The Poughkeepsie Ins. Co.*, 23 Id. 623, 627; *Hyatt v. Esmond*, 37 Barb. 605. These cases were reversed on error but for reasons not involving the point decided by the court below, which was adjudged in the same way in *Hoffman v. Aetna Ins. Co.*, 1 Robertson, 501; 32 New York, 485.

In the *Buffalo Steamship Works v. The Sun M. F. Ins. Co.*, 17 N. Y. 401, 472, the court cited and approved the opinion of Barculo, J., in *Tillou v. The Keystone Ins. Co.*, 7 Barb. 570, that a sale by one part owner to another is not a forfeiture of a condition against alienation

in a contract of insurance with both; and it is the established rule in New York and some other parts of the Union, that a partner may be bought out by his copartners, or withdraw from the firm, without defeating a prior insurance either on general principles, or under a provision that the policy shall be void if the property is sold or conveyed.

In *Hoffman v. The Aetna Ins. Co.*, the court said that when the words of the contract are sufficiently large, the recovery may extend beyond the interest held at the execution of the policy to the whole value at risk at the time of the loss, and that it will make no difference under these circumstances whether the subsequent title is derived from a stranger to the contract, or from a part owner who joined in effecting the insurance.

It has been decided on the other hand in several instances, that the withdrawal of a partner or the transfer of his interest to another member of the firm without the consent of the insurers, will defeat a policy conditioned against alienation. *Keeler v. The Niagara Ins. Co.*, 5 Wis. 123; *Findlay v. Lycoming, Ins. Co.*, 6 Casey, 310; *Buckley v. Garret*, 11 Wright, 204, 209; *Dreher v. The Aetna Ins. Co.*, 18 Missouri, 135; *The Hartford F. Ins. Co. v. Ross*, 23 Indiana, 179; *Wood v. The Rutland M. F. Ins. Co.*, 31 Vermont, 532; *Dix v. The Mutual Ins. Co.*, 37 Ill. 272; and in *Dreher v. The Aetna Ins. Co.*, a dissolution of the partnership was said to have the same effect in avoiding the policy as a sale.

We have seen, that the insured may as well contract for an indemnity, against loss by the destruction of property which he may subsequently acquire, as of that which he has at the time of effecting the insurance; and that a time policy on goods or furniture in a house or store, will cover chattels which are bought and placed in the building subsequently to the execution of the policy (ante, 848). 2 Arnould on Insurance, 1265, 1266; *Hooper v. The Hudson River Ins. Co.*, 15 Barbour, 413. The law was so held in *Rhind v. Wilkinson*, 2 Taunton, 237, where the court said that it was enough, if the plaintiff had an interest in the property at the time when it was destroyed, and that it was everyday's practice to insure goods before they were purchased. Hence, the better opinion would seem to be, that an insurance made in good faith, with a view to a future purchase of a house or vessel, will take effect as soon as it is bought, and entitle the insured to an indemnity for the subsequent destruction of the property by fire. Thus, in *Martin v. The Fishing Ins. Co.*, 20 Pick. 389, an insurance effected by one part owner of a vessel in his own name, for whom it might concern, was held to cover the share of another owner which was assigned to him subsequently, in pursuance of a prior understanding that it should enure as a security for advances, which he had made at the time when the vessel was purchased.



In this aspect of the case it can make no difference, that the chattels for which the plaintiff seeks to recover were originally covered by the policy, and then sold to a third person from whom they were bought back before the loss. In *Lane v. The Marine Ins. Co.*, 12 Maine, 44, the effect of a sale in placing the goods beyond the reach of the insurance, was accordingly held to be obviated by a repurchase; and the same point was decided in *Hooper v. The Hudson River M. Ins. Co.*, 17 New York, 424, and *Wolf v. The Security Ins. Co.*, 39 Id. 4. "When," said Hunt, C. J., in the latter case, "the sale was made by Engelheart to Stupp, the interest in the property and the interest in the policy became separated. While this separation continued, the operation of the policy was suspended, and if a loss had then occurred, no recovery could have been had. Engelheart could not have recovered, because he had no goods covered by the policy. Stupp could not have recovered, because he had no policy to cover his interest in the goods. But the moment the interests should be brought together by the union of the ownership of the property, and the interest in the policy in the same person, the insurance would again become effectual. If Engelheart had bought other goods, the policy in his name would have covered them. If Stupp had procured the policy he would have had the benefit of it as an insurance of the original property." It was held to follow, that upon the union of the goods and the policy in the same hand by an assignment to a third person, the insurance which had been suspended took effect for his benefit.

It was held, in like manner, in *Worthington v. Bearse*, 12 Allen, 332, that the insurable interest in a house which has been divested by a sale may be revived by a reconveyance to the vendor. The court said that the parties to the contract were the same, and the risk unchanged, and there was no reason why the policy should not operate according to its original design.

In *Cockerill v. The Cincinnati Ins. Co.*, 16 Ohio, 148, however, where a similar question arose out of the insurance of a steamboat against fire, the court were of opinion, that the policy had been avoided by a sale of the boat after she was insured, and did not revert upon a subsequent reconveyance before the loss. This decision might be sound, if the policy were an insurance of the estate or interest of the person by whom it is effected, which would limit its operation to his right or title as at the time. But the cases are express and numerous to the point, that an insurance intended for the protection of one interest, will enure for the protection of any other that may subsequently arise out of the property insured, or which will be impaired or rendered insecure by its loss (ante, 893). Thus, the insurance of a house or vessel, will endure after the right of ownership has been divested by a sale, for the protection of the interest of the vendor in the price, not only

when he retains the legal estate in his hands as a security, but when he parts with the whole legal and equitable title, and takes a mortgage or judgment for the purchase money; *The C. M. Ins. Co. of Wheeling v. Morrison*, 11 Leigh, 354; or when a conveyance is made for the benefit of creditors, and the debts of the grantor paid from another source, (ante, 819). And if this is true of a resulting trust it should be equally so of the interest arising from a repurchase.

Few questions in the law of insurance are of more importance or occur more frequently, than those arising out of the provisos introduced into most policies of the present day with a view to control the operation of the contract, and impose restrictions on the insured which would not arise under the general rules of law. Thus the policy usually makes it the duty of the owner to give notice of any insurance which exists at the time when it is executed, or may be effected subsequently, and declares that the contract shall be void unless the requisition is fulfilled. In *Carpenter v. The Washington Ins. Co.* (ante, 878), Story, J., was clearly of opinion that a prior insurance was not less within this condition because it was vitiated by a misrepresentation of a material fact. Such an error might be waived by the insurers and the contract affirmed, and if so, the evil would arise which the condition was meant to obviate. A similar view was taken in *Bigler v. The New York Ins. Co.*, 20 Barb. 267; 22 New York, 402, where the question arose out of the failure to give notice of a subsequent insurance, which had been invalidated by the laches of the insured in not communicating the existence of the policy on which the suit was brought.

In *Davis v. The Hartford Ins. Co.*, 13 Iowa, 69, it was contended, on behalf of the plaintiffs, that as the second policy was avoided by the failure to disclose the nature of the interest at risk, it did not avoid the first, but the court held that if this argument could be good, under any circumstances, it was not so in the case under consideration, where the subsequent insurance had been ratified by the insurers, who might, on general and well settled principles affirm the contract notwithstanding the breach of a provision introduced for their benefit. See *Bigler v. The New York Ins. Co.*, 22 New York, 402.

On the other hand, it has been held in Pennsylvania and Massachusetts, that as the object of such provisions is to guard against the temptation to fraud which may grow out of the existence of a double insurance, they should not be so construed as to avoid the policy, for a failure to give notice of a subsequent insurance which is invalid from the outset, through an omission to notify the insurers that the property is already insured. *Jackson v. The M. F. Ins. Co.*, 23 Pick. 418; *Clark v. The New England M. Ins. Co.*, 6 Cushing, 342; *Hardy v. The Marine Ins. Co.*, 4 Allen, 217; *Kimball v. The Howard Ins. Co.*, 8

Gray, 33; *Stacey v. The Franklin Ins. Co.*, 2 W. & S. 506. It was said that an insurance which cannot be enforced without the consent of the insurers is none, and does not operate as a breach of the condition. *Clark v. The New England Ins. Co.*, 6 Cushing, 342. This view prevails in many of the other States. *Obermeyer v. The Globe M. Ins. Co.*, 43 Missouri, 573; *Gale v. Belknap Ins. Co.*, 41 New Hampshire, 170; *Schenck v. Mercer C. F. Ins. Co.*, 4 Zabriskie, 447; *Philbrook v. The New England Ins. Co.*, 37 Maine, 137; *The Rising Sun Co. v. Slaughter*, 20 Indiana, 520; and has been held to apply, even when the subsequent policy is ratified by payment, because if the first insurance is good when made, and at the time of the loss, it cannot be invalidated by the subsequent acts of third persons. *Hardie v. The Marine Ins. Co.*, 4 Allen, 207; *Philbrook v. The New England Ins. Co.* In *Mitchell v. The Lycoming Ins. Co.*, 1 P. F. Smith, 402, however, a policy conditioned that the aggregate amount insured in that or other companies should not exceed two-thirds of the actual value, was held to be avoided by a subsequent insurance, which, though voidable, had been ratified by the payment of the loss.

It follows conversely from the same principle, that a policy which is void from fraud or any other cause, will not operate as a breach of a condition in a subsequent policy requiring notice to be given of prior insurances. This seems to have been taken for granted in *Clark v. The New England Mutual Ins. Co.*, 6 Cushing, 342, although the point was not actually before the court, and was expressly determined in *Jackson v. The M. T. I. Co.*, 5 Gray, 52; see *Massey v. Atlas Ins. Co.*, 4 Kernan, 79.

These decisions avoid the hardship of pronouncing the insurance void in consequence of a failure to give notice of another which is equally invalid, and thus leaving the assured without a remedy on either policy, but are perhaps open to the more serious objection of enabling the owner of a house to insure it for its full value at two different offices, and keep each set of insurers in ignorance of the contract with the others, without the risk of loss if the secret is discovered, and with the certainty of gain if it remains concealed.

A subsequent will not avoid a prior insurance, unless the parties are the same, nor when the interest covered by the policy is different. *Nichols v. Fayette Ins. Co.*, 1 Allen, 63; *Cox v. The Phoenix Ins. Co.*, 52 Maine, 355; *Tyler v. The Aetna Ins. Co.*, 16 Wend, 385; *The Mutual Ins. Co. v. Hall*, 2 Comstock, 35. Hence a mortgagee may enforce an insurance effected for his benefit, notwithstanding a subsequent insurance of the premises by the mortgagor. *Coster v. The Equitable Ins. Co.*, 2 Gray, 216; *Woodbury Bank v. The Charter Oak Ins. Co.*, 31 Conn. 517, and a policy obtained on the freight of the vessel by the consignee, will not preclude the consignor from enforcing a prior policy

containing a warranty that there is no other insurance. *Williams v. The Crescent M. Ins. Co.*, 15 Louisiana, Ann. 651. Such conditions, like all stipulations tending to a penalty or forfeiture are strictly construed, and a proviso against "further insurance," will not be broken by the existence of a previous insurance which is not communicated to the subsequent insurers. *Massey v. The Atlas Ins. Co.*, 4 Kernan, 79. When, however, the condition is explicit, a failure to give notice of a prior or subsequent valid insurance in compliance with its terms, will be fatal; and when these require the ratification to be endorsed in writing, and the policy is under seal, an oral communication will not be sufficient, although received as such by the insurers (ante, 881); *Barrett v. M. F. I. Co.*, 7 Cushing, 175; *The Conway Tool Co. v. The Hudson River Ins. Co.*, 12 Cushing, 144; *Pindar v. The Annon Ins. Co.*, Id. 469; *Kimball v. Howard Ins. Co.*, 8 Gray, 35; *Gilbert v. Phoenix Ins. Co.*, 36 Barb. 372; *Hale v. The Mechanics Ins. Co.*, 6 Gray, 169; *Massey v. Atlas Ins. Co.*, 4 Kernan, 79; although relief may be given in equity where the defendants fraudulently cause the error of which they seek to take advantage. See *Carpenter v. Washington Ins. Co.*, 4 Howard, 284.

It was said by Story, J., in *Carpenter v. The Washington Ins. Co.* (ante), that a clause which prohibits the assignment of the policy without the consent of the insurers, and then goes on to declare that the interest of the insured shall not be transferred or assigned without such consent, should be construed as referring to the interest in the property covered by the insurance, and not to the policy, because a transfer of the policy, viewed as a contract, and apart from the property, simply operates as an equitable assignment of the proceeds, in case anything shall become due; while the consent of the insurers is always necessary to give a purchaser of the property a right to an indemnity under an insurance against fire. *Brichla v. The Lafayette Ins. Co.*, 2 Hall, 372; *Ellis v. Kreutlinger*, 27 Missouri, 311. A similar view was taken in *Millen v. The Hamilton Ins. Co.*, 5 Duer, 101; but in *Smith v. The Saratoga Ins. Co.*, 1 Hill, 497; 3 Id. 508, a different conclusion was drawn from the same premises, and a condition against assignment, said to refer *prima facie* to a transfer of the instrument or contract and not a change of the ownership or title, to which the insurers had no motive for prohibiting, and would, if made without their consent, avoid the insurance. See *Phelps v. Gebhard Ins. Co.*, 5 Bosworth, 404.

All the authorities concur that as such restrictions are against common right, and should be strictly construed; *Courtney v. N. Y. Ins. Co.*, 28 Barb. 116; a condition against alienation will not apply to a transfer by operation of law, or for the benefit of creditors; *Hubbs v. The Memphis Ins. Co.*; and in *Courtney v. N. Y. Ins. Co.*, the court said that in prohibiting the assignment of the policy, the insurers could not be supposed to have intended to prohibit the insured from

transferring the amount to which he was entitled, as damages or compensation in the event of loss, because it must be a matter of indifference to them to whom they paid money which was conceded to be due.

A doubt may here be suggested, whether a clause in restraint of the power of transfer or alienation, is not contrary to legal policy, and void. This was well settled at an early period, with reference to vested interests; 1 Smith's Leading Cases, 111, 655, 6 Am. ed.; and would seem equally true at the present day of rights of action, which are now universally admitted to possess all the incidents which belong to property, and among them, that of being transferable from hand to hand: 2 Leading Cases in Equity, part II., 333, 3d Am. ed. A proviso in a bond or other engagement for the payment of money, that it should not be transferred, and that if it were, the obligor should be discharged from all further liability, would probably be disregarded by a court of equity, as contrary to its uniform course, which is to uphold and facilitate the assignment of debts and choses in action, as beneficial to the parties, without imposing any additional burden on the debtor. And there can be little doubt, that the transfer of a policy of insurance, should be as much favored as that of a debt or bond. Some of the policies now in use, preclude the insured from assigning the right of action for the loss after it has happened, and thus deprive him of the power of obtaining credit on the faith of the indemnity promised by the insurers, at a time when the use of all his available means may be essential to his solvency, or the successful prosecution of his business; and the mischievous nature of such a restraint would seem a sufficient reason for holding it illegal. The assignment of a marine policy to a purchaser of the property covered by its terms, works a change in the contract, which may justify the insurers in surrounding it with restrictions; but the assignment of a policy against fire, leaves the right of the parties precisely as they were before; *The Brooklyn Ins. Co.*, 39 Barb. 22; and cannot be prohibited or made a ground of forfeiture, without a wanton interference with the rights of the insured. Obligations are, and of right ought to be, so far assignable, as to entitle the assignee to whatever is, or may become due to the assignor; and there is nothing in a policy of insurance, viewed as a chose in action, and not as an insurance, to withdraw it from the operation of the principles which sustain and regulate the transfer of other contracts for the payment of money, whether absolute or conditional. Emerigon *Traité des Contrats*, a la Grosse, ch. 12, § 7; *St. John v. The American Life Ins. Co.*, 3 Kernan, 31. Every debt or demand which can be made the subject of a power of attorney or placed in the hands of an agent for collection, may be assigned, because an irrevocable power or authority to collect operates as an assignment;

while an equitable assignment is virtually a power or authority, given for a consideration and which cannot therefore be recalled (*ante*, 552). 3 *Leading Cases in Equity*, 360, 3 *Am. ed.* The right to depute another to demand and receive the amount due on a policy of insurance, or other obligation for the payment of money, must be conceded, and the debtor can hardly be entitled to inquire whether the agent is bound to account to the principal, or has been expressly or impliedly authorized to retain the amount collected for himself, or appropriate it to his own purposes. Hence, while the insurers may restrict their liability to the loss or damage sustained by the insured, and refuse to be answerable for any injury by which he does not suffer, we may doubt whether they are entitled to refuse the amount which may become due under the contract, to any one whom he may appoint to receive it by a revocable or irrevocable power of attorney, or by any of the numerous modes of equitable assignment, which are all the same in substance. *Courtney v. The New York Ins. Co.*, 28 *Barb.* 116.

It is accordingly well settled, notwithstanding some earlier cases looking the other way; *Hobbs v. The Memphis Ins. Co.*, 1 *Sneed*, 444; *Day v. Poughkeepsie Ins. Co.*, 23 *Barb.* 623; that the contract of insurance becomes on loss a mere debt or chose in action, and may be assigned, notwithstanding a clause prohibiting the transfer or alienation of the interest of the insured, or of the policy as such, without the consent of the insurers. *Mellen v. The Hamilton Ins. Co.*, 17 *New York*, 609; *Goit v. The National Ins. Co.*, 25 *Barb.* 189; *Carroll v. The Charter Oak Ins. Co.*, 38 *Id.* 402; 40 *Id.* 492; *The West Branch Ins. Co., v. Helfenstein*, 2 *Wright*, 89; *Carter v. The Humboldt Ins. Co.*, 12 *Iowa*, 287; *Walters v. The Washington Ins. Co.*, 1 *Clarke*, 404.

In these instances the transfer being made to a stranger, who had no insurable interest, necessarily operated as an assignment of the debt or demand, and not of the insurance as such; but a purchaser or mortgagee may be designated as the person to receive the money without becoming a party to the contract with the insurers, or an assignee of the policy in the strict sense of the term.

The assignment of a policy of insurance may be viewed in two different aspects. In one of them it passes the insurance considered as such. In the other it is a mere equitable transfer of the right to receive any sum that may be due in the event of loss. A purchaser who buys a vessel and takes an assignment of the policy is substituted in the place of the vendor. He must, it is true, sue in the name of the latter, but the recovery is in his own right, and the defendants cannot rely on the determination of the insurable interest of the nominal plaintiff as a bar. The liability of the insurers is under these circumstances for all practical purposes the same as if the insurance had been effected in the first instance by the assignee. It is a qualified negotiation of

the instrument, which may be likened to the passage of a covenant of warranty with the estate to which it is made incident by the deed. Such is also the rule in the case of an insurance against fire, except that the consent of the insurers is requisite to give validity to the transfer.

On the other hand, an assignment of the policy to a stranger in interest, can only operate as an equitable appropriation or transfer of the damages that are or may be payable for the destruction of the property by the perils for which the insurers have agreed to be answerable. The fund is assigned, and not the contract, nor the right to be indemnified under it in the event of loss. The assignee stands in the shoes of the assignor without acquiring a new or independent status, and cannot recover unless the assignor has an insurable interest when the loss occurs. Such an instance is afforded by the transfer of a policy as collateral security to a creditor who has no estate or interest in the premises insured. *Bibend v. Liverpool*, 30 California, 78.

In the cases above supposed the distinction is plainly marked and may be readily applied, but there is a third where the assignment may have a twofold operation, and it is not always easy to say which was designed. This occurs when the policy is transferred to a mortgagee of the property covered by the insurance. Here there are two insurable interests, each of which may subsist and be a ground of action, notwithstanding the determination of the other. The mortgagor is entitled to indemnity as the owner of the equity of redemption; the mortgagee by virtue of his lien for the debt; and as the extinguishment of the mortgage will not affect the right of the mortgagor, so a sale or alienation by the mortgagor will not preclude a recovery by the mortgagee. Such at least is the case when the consent of the insurers is obtained, or is not requisite to the validity of the transfer, and there is no condition against alienation (ante, 882). When, however, the insurance is against fire, or contains a proviso that it shall not be assigned without the consent of the insurers, a different question may be presented. If the property is conveyed under these circumstances, and the policy transferred to the purchaser without the sanction of the insurers, the insurance will be at an end, and there can be no liability under it for a subsequent loss. The assignor cannot recover, because his insurable interest has been determined by the sale; and the assignee is not a party to the contract originally, or by virtue of the assignment. When, however, the policy is assigned to a mortgagee, and not to an absolute purchaser, there is this material difference that the assignor retains an insurable interest, and may recover as if the mortgage had not been executed. His right in this regard is a chose in action, a demand assignable in equity to any one to whom he thinks fit to transfer it; and it may consequently be transferred as a collateral

security to the mortgagee. It is immaterial that the policy does not attach to the insurable interest of the latter; he will still be entitled to the amount due for any loss that may be sustained by the mortgagor. If the assignment does not operate to pass the contract of insurance because the assent of the insurers was not given, it should still be construed as an equitable transfer of the claim of the assignor to compensation for the loss. The force of this argument is so obvious, that it must prevail unless excluded by the terms of the policy. It is well established that a contract should be so construed *ut res valeat*; and general words of grant will consequently be applied to that which the party can transfer, and not to that which he cannot. A vessel which has been insured is mortgaged. The insurers do not, perhaps will not, sanction an assignment of the policy. The loss is, however, payable by the terms of the instrument to the order of the mortgagor, and would be so if there were no express stipulation. Instead of giving an order or power of attorney, with a clause declaring his intention to pass the fund irrevocably by way of anticipation, he endorses the policy in blank and delivers it to the mortgagee in pursuance of an agreement to keep the property insured for the benefit of the latter. Manifestly the transaction should be construed in accordance with the intention of the parties as an equitable transfer of the right to receive the money, and not as an assignment of the policy as an insurance.

It may be said that a condition that the policy shall be void if transferred without the consent of the insurers is broad enough to include an assignment either of the insurance as such, or of the amount that may be due under it in the event of loss. In considering this argument, it is necessary to remember that restraints on alienation are to be strictly construed. Of two interpretations, that is to be preferred which reconciles their operation with the general principle that every one may give what he possesses or is entitled to receive. A man who contracts with one person may well refuse to permit another to become a party to the agreement. This is peculiarly true when the relation is one of trust and confidence, which is necessarily the case between the insurers and the insured. The former may therefore properly require that they should not be put under an obligation to indemnify a third person by an act to which they do not agree. But a provision that the insured shall not be permitted to transfer the amount that may become due under the contract as originally made, is a very different thing. Rights of action *ex contractu* are in the contemplation of equity as susceptible of alienation as rights which have been reduced to possession. In either case a restraint imposed capriciously without a sufficient cause, is contrary to good policy and void.

It is accordingly established that the right of action arising from a loss may be transferred subsequently without the consent of the in-



surers, notwithstanding an express provision that if such an assignment be made, "the policy shall be void, and all liability of the company under it shall henceforth cease." *The West Branch Insurance Co. v. Helfenstein*, 4 Wright, 289. Woodward, C. J., said that "however competent it might be for the company to make the contract of insurance dependent upon such a condition, it was not competent for them to limit the legal effect of a claim upon them after a loss. The insured acquired by reason of the loss, a legal right to receive so much money from the hands of the company. That chose in action he might assign. The condition appealed to was not a defence. If it was applicable to a case like that under consideration, it was void and null because opposed to the law of the land."

In this instance, the assignment was subsequent to the loss; but the reasoning of the chief justice is not less in point where the transfer is made previously and designed to take effect when the loss occurs. A man cannot, it is said, assign the freight of the ship which he is about to build, or the wool of the sheep which he intends to buy; but a contingent right depending on an existing contract is assignable in equity, and for some purposes, at law.

These views are sustained by the cases of *Cromwell v. The Brooklyn Fire Insurance Co.*, 39 Barb. 227, and *Shotwell v. The Jefferson Insurance Co.*, 5 Bosworth, 247. The former case was virtually a bill in equity by an unpaid vendor to have the benefit of an insurance effected by the purchaser. It appeared from the evidence that the vendee had gone into possession under an agreement to keep the premises insured as security for the unpaid balance of the purchase money. A policy was taken out in pursuance of this agreement, which contained the following proviso: "The interest of the insured in this policy is not assignable unless by consent of this corporation, manifested in writing. In case of any transfer or termination of the interest of the insured either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect."

The court said that if the interest of the insured had been assigned without consent, it would have been a breach of the condition, and no recovery could have been had on the policy by any one. It was, however, established under *Mellen v. The Hamilton Fire Insurance Co.*, 17 New York, 609, that such a clause did not apply to a transfer of the policy, or of the claim arising under it, after the happening of a loss. In the case before the court, the plaintiff was not an assignee of the policy in the sense of the condition, nor did his claim arise through a transfer of the interest covered by the insurance. His true position was that of an equitable assignee of the right of the purchaser to compensation for the destruction of the premises. It had been contended that an equitable assignment of the policy of insurance was as

much within the prohibition of the policy, and within the mischief it was intended to prevent, as a legal assignment. It was not necessary to consider the truth of this proposition, because the right which plaintiff had acquired was not to the policy as such, but to the money due as compensation for the loss. Such an assignment was not equivalent to an assignment of the policy, whether made before or after the occurrence of the injury. The short answer to the objection made on behalf of the insurance company, was that the plaintiff was an equitable assignee of the fund arising out of the obligation of the contract, and not of the policy, and therefore not within the clause prohibiting the assignment of the policy.

Another question, which arose in *Smith v. The Saratoga Ins. Co.*, turned on the point, whether a policy invalidated by a breach of condition or other cause, can be revived, and rendered binding, by subsequent acts of the insurers, manifesting an intention to treat it as a valid and subsisting contract, notwithstanding, and with a full knowledge of the forfeiture. Bronson, J., who delivered the judgment of the court, was strongly of opinion, that a contract conditioned to be absolutely void upon the happening of a particular event, cannot be revived by the acts of one or both of the contracting parties, or by an express waiver on the part of those who are entitled to enforce the forfeiture, which was said to be well settled, when the question arose on a condition of defeasance attached to a lease for years, and to be equally true of a policy of insurance. But the weight of authority in modern times, would seem to be the other way, and to support the just and reasonable proposition, that every clause of avoidance or forfeiture, should be construed as meant for the benefit of the person in whose favor it is reserved, and as giving him the option of abrogating the contract, or of setting it up and insisting on its performance. *Hyatt v. Esmond*, 37 Barb. 601; *Hyatt v. Wait*, *Ib.* 27; *Huntly v. Perry*, 38 *Id.* 569; *The North Berwick Ins. Co. v. The New England Ins. Co.*, 52 Maine, 336; *Carroll v. The Charter Oak Ins. Co.*, 38 Barb. 402, 407. This rule, which would now seem well settled when leases for years are in question (*Clark v. Jones*, 1 Denio, 516; 1 *Smith's Leading Cases*, 94, 107, 6 Am. ed.); and has been repeatedly applied to other agreements (*Roberts v. Davy*, 4 B. & Ad. 664; *Malins v. Freeman*, 3 Bing. N. C. 395; *Beaty v. Harkey*, 2 Smedes & Marshall, 563; *Woods v. Kirk*, 8 Foster, 324); is the more just and reasonable, because a different interpretation would give an undue advantage to the wrong-doer, and enable him to use the violation of one stipulation as an excuse for escaping from the obligation of another. Thus, in *Cartwright v. Gardner*, 5 Cushing, 273, 281, a provision that a contract for the sale of land should be void, unless the purchase money was paid on the day appointed for its payment, was said to be intended solely

for the benefit of the vendor, and therefore susceptible of being waived by him. The view taken in *Smith v. The Saratoga Ins. Co.*, has accordingly been overruled by the subsequent course of decision and a renewal of the policy, or the receipt of premium with knowledge of a prior forfeiture held to ratify the contract, whether the terms of the condition are that the policy shall be absolutely void on breach, or merely voidable. *Viele v. The Ins. Co.*, 26 Iowa, 9; *Keenan v. Dubuque*, 13 Iowa, 375; *The Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Hyatt v. Esmond*, 37 Barb. 601; *Vose v. Hamilton Ins. Co.*, 39 Id. 302; *The N. American Ins. Co. v. The New England Ins. Co.*, 32 Maine, 36; *Buckley v. Garrett*, 11 Wright, 204; *Insurance Co. v. Stockbower*, 2 Casey, 199; *Leathers v. The Farmers' M. Ins. Co.*, 14 Foster, 259; *Burbank v. Rockingham Ins. Co.*, Ib. 550; *Bouvier v. Conn. L. Ins. Co.*, 23 Conn. 234; *Bouton v. American Ins. Co.*, 25 Id. 542; *Lycoming Ins. Co. v. Shellenberger*, 8 Wright, 259. And as the nature of the breach makes no difference in the principle, the insurers may in like manner waive the right to take advantage of a failure to give notice of a prior insurance, or to have it endorsed on the policy as the terms of the contract require. *The Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

A waiver will consequently result from any act or declaration of the insurers in affirmance of the contract, and tending to benefit them, or prejudice the insured. *The Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Buckley v. Garrett*, 11 Wright, 204. In *Buckley v. Garrett*, the court held that the payment of the premium and the acceptance of it by the insurers, with knowledge of the breach of a condition against alienation, was evidence from which the jury might infer a waiver of the forfeiture. The law has been so held in numerous instances, in Pennsylvania and elsewhere. *Baker v. The Ins. Co.*, 16 Robertson, 393; *Frost v. The Ins. Co.*, 5 Denio, 154.

There can, however, be little doubt as to the point actually determined in *Smith v. The Saratoga Ins. Co.*, because the plaintiff failed to show that the sum paid after the forfeiture of the policy, was not due before, which brought the case within the well settled principle, that the right to enforce a breach of condition, will not be barred by asserting a right which was complete at the period when the breach happened. A similar explanation may be given of the case of *Neily v. The Onondago Ins. Co.*, 7 Hill, 49, where the premium assessed on one side and paid on the other, was independent of the forfeiture which it was said to have waived, and equally due, whether the policy had or had not been invalidated; 1 Smith's Ldg. Cases, 101, 6 Am. ed.

A waiver can only grow out of some necessary repugnancy between the course adopted at one period and that taken at another, and there is nothing necessarily repugnant, in enforcing one part of a contract, while repudiating the residue. Those who enter into a contract of

mutual assurance, may obviously be bound to contribute to the indemnity of others, after they have forfeited the right to protection for themselves; *Hyatt v. Wait*, 37 Barb. 29; and the law was so held in *Phillbrook v. The New England Ins. Co.*, 37 Maine, 137, 144. It is equally well settled, that the proof of a waiver will be inadequate, unless it is shown that the insurers knew of the forfeiture at the time of doing the act, which is alleged to have deprived them of the power to enforce it; because waiver is essentially a question of intention, and cannot arise out of an act done in ignorance, or without a full knowledge of all the material circumstances. 2 Smith's Ldg. Cases, 109, 6 Am. ed.; *Allen v. Vermont Ins. Co.*, 12 Vt. 366. Notice to an agent, within the scope of the authority conferred upon him, will, in this, as in other cases, be notice to the principal; *Beebe v. Hartford Fire Ins. Co.*, 25 Conn. 51; *Beal v. The Park Ins. Co.*, 16 Wis. 241; but the employment of an agent to collect the premium, will not necessarily authorize him to vary the contract under which it is due, and the question will then turn on whether he was authorized to contract for the insurers, as well as receive the consideration paid by the insured. *Bouton v. The American Life Ins. Co.*, 25 Conn. 542; *Sheldon v. The Conn. Ins. Co.*, Ib. 207; *Shotswell v. The Jefferson Ins. Co.*, 5 Bosworth, 247; *Pollard v. The Somerset M. F. Ins. Co.*, 42 Maine, 221; *Viele v. The Germania Ins. Co.*, 26 Iowa, 957.

We have seen that a sale of the thing insured, which deprives the vendor of all interest in its preservation, will preclude a recovery for a subsequent loss, unless it is accompanied by a transfer of the policy, which, when a fire insurance is in question, must, moreover, receive the assent or concurrence of the insurers (ante, 884). But most of the policies in use in this country, prefer to guard against this contingency by an express stipulation instead of relying solely on the rule of law, and accordingly provide that a sale or alienation of the property shall avoid the contract, unless sanctioned by the consent of the insurers. The courts have generally put a liberal construction on this proviso, by holding that the alienation must be complete of all the interest of the insured. *Hitchcock v. The Northwestern Ins. Co.*, 26 N. York, 68. Hence, a contract of sale will not invalidate the insurance if the vendor retains the legal title, and continues to have an interest in the preservation of the premises, as a security for the payment of the purchase money; *The Perry Co. Ins. Co. v. Stewart*, 7 Harris 45; *Trumbull v. The Portage M. F. Ins. Co.*, 12 Ohio, 305; *Masters v. The Madison Co. M. Ins. Co.*, 11 Barbour, 624; at all events until the terms of the sale are so far fulfilled, as to invest the vendee with the full equitable ownership, and entitle him to immediate possession of the property sold; and the same thing is true of a mortgage or other conveyance, executed merely as a security for a debt and not with the view of alienating or parting

with the right of ownership. *Conover v. The M. Ins. Co.*, 1 Comstock, 296; *Jackson v. The Massachusetts M. F. Ins. Co.*, 23 Pick. 48; *Rolins v. The Columbia F. Ins. Co.*, 5 Foster, 200; *Rice v. Tower*, 1 Gray, 426; *Holbrook v. The American Ins. Co.*, 1 Curtis, 193.

An assignment as collateral security or by way of mortgage, will not therefore be a breach of a condition that the policy shall be void if the title to the premises is changed or alienated by a deed, mortgage, or in any other manner; *Shepherd v. Union Ins. Co.*, 38 New Hampshire, 232; *Ayres v. The Hartford Ins. Co.*, 17 Iowa, 176; 21 Id. 193; because what the insurers will be presumed to have had in view is the danger of foreclosure, and not the mere creation of an encumbrance; and the same thing has been held of an assignment for the benefit of creditors not attended with an actual transfer or delivery of possession. *Phoenix Ins. Co. v. Lawrence*, 4 Metcalfe, Kentucky, 9. This view was carried still farther in *Tittmore v. The M. F. Ins. Co.*, 20 Vermont, 546, by a decision, that a conditional sale did not fall within the terms of a condition against alienation, although carried into effect by a conveyance of the property, followed by an immediate reconveyance, with a stipulation, that if the vendee should pay the vendor two thousand dollars within three years, and should permit him to remain in possession until it was paid, the reconveyance should be void, or otherwise remain in full force and virtue. The court distinguished the case from that of an ordinary sale, secured by a mortgage for the purchase money, and said that the transaction was substantially a covenant to convey, in the event of the performance of a condition which might never be fulfilled. So in *Hitchcock v. The N. W. F. Ins. Co.*, 26 New York, 68, the conveyance of a vessel attended by a reconveyance as a security for the price, was held not to invalidate the insurance either on general principles, or under a clause that the policy should be void if the property was assigned without the consent of the insurers. The case of *Stetson v. The Mutual F. Ins. Co.*, 4 Massachusetts, 333, was cited as being to the same point, and it can, as it would seem, make little difference whether the vendor enters into an executory agreement, or conveys the property taking a mortgage as security, because his interest is limited in either case to a lien with a right of entering into possession if payment is withheld. *Phelps v. Gebhard Ins. Co.*, 9 Bosworth, 404. In *Fernandez v. The Great Western Ins. Co.*, 3 Robertson, 470, 473, the plaintiff who had conveyed absolutely and taken a mortgage for the purchase money, was allowed to recover in spite of a condition that any change of interest in whole or in part should be an avoidance of the policy; and this course of decision is the more reasonable because the language of the policy being that of the insurers, should, where there is a reasonable doubt, be interpreted most favorably to the insured. See 2 Smith's Ldg. Cases, 519, 6 Am. ed.

The rule that conditions involving a forfeiture or imposing a restraint on the right of ownership should be strictly construed, will not, however, be carried so far as to vary their obvious meaning, or defeat the purpose for which they were reserved; and when the proviso is against "any alienation or alteration of the title," or that the insurers shall be discharged if the property be sold or alienated in whole or in part, an assignment for the benefit of creditors will, it seems, be as effectual in invalidating the policy as an absolute sale; *Edmunds v. Mutual Safety Ins. Co.*, 1 Allen, 311; *Hazard v. The Franklin Ins. Co.*, 7 Rhode Island, 429; *Orrell v. Hampden Ins. Co.*, 13 Gray, 431, 433; *Western Ins. Co. v. Rich*, 10 Minnesota, 279; *Abbott v. Hampden Ins. Co.*, 13 Maine, 413; and a sale secured by a mortgage has been held to fall within the same category. *Tomlinson v. The Monmouth Ins. Co.*, 47 Maine, 272. The question is obviously one of construction depending on the intention of the parties as indicated by the terms employed, rather than on any general rule, although language borrowed from common use should not receive a technical interpretation tending to defeat the end for which the contract was framed. A conveyance which leaves the control and equitable ownership of the premises as it was before, is not in any just sense a sale or alienation. When, however, the right of property passes out of the grantor, and vests under the deed or contract in the grantee, the transaction is not less a violation of a condition against sale or alienation in the common acceptation of the term, because the legal title remains in the grantor as a security for the price, and he may re-enter if it is not paid (*ante*, 820).

A condition against alienation, in a lease or grant, will not be broken by an involuntary sale or transfer, made under the authority of the law; 1 Smith's Leading Cases, 97, 110, 6 Am. ed.; and the rule is the same when the question arises under a policy of insurance on a sale by the sheriff, or a petition in bankruptcy followed by a decree vesting the right of property in the assignee; *Marigny v. The Home M. Ins. Co.*, 13 Louisiana, Ann, 338; *Adams v. The Rockingham Ins. Co.*, 29 Maine, 222; *Burbank v. The M. F. Ins. Co.*, 4 Foster, 550; *Bragg v. The M. Ins. Co.*, 5 Id. 289; *Strong v. The M. Ins. Co.*, 10 Pick. 40; *Clark v. The New England M. F. Ins. Co.*, 6 Cushing, 342; although every transfer, whether by an execution or otherwise, which deprives the insured of his interest in the preservation of the property, must necessarily preclude him from recovering for a subsequent loss, on general principles aside from the terms or provisions of the policy. *The Mount Vernon Ins. Co. v. The Summit Ins. Co.*, 10 Ohio, N. S. 347. A descent of the property on the heirs of the insured, is also a transfer by operation of law, and as such, not within a clause against alienation; *Burbank v. The Rockingham Ins. Co.*, 4 Foster, 550; and the dispo-

lution of a firm by death, or by the decree of a competent tribunal, would, also, seem to fall under the head of an involuntary alienation by operation of law; *Wood v. The Rutland M. F. Ins. Co.*, 31 Vermont, 552; but this cannot be said of a change of interest, or a dissolution effected by agreement, or through a release executed by a copartner. *Dreher v. The Aetna Ins. Co.*, 18 Missouri, 128 (ante, 896).

Whether a conveyance by one partner or tenant in common to another, is such a breach of a condition in restraint of alienation as to work a forfeiture of a policy effected by both, is a question which, having been decided in the affirmative in some instances; *Findlay v. Lycoming Ins. Co.*, 2 Wright, 311; and in the negative in others; *Hoffman v. The Aetna Ins. Co.*, 32 New York, 405; *Hibbs v. Memphis Ins. Co.*, 1 Sneed, 446, may be regarded as among the doubtful problems of the law (ante, 895).

What acts or declarations will operate as a waiver of the warranties or conditions, which play a large and important part in most modern policies of insurance on life or against fire, is a question about which the authorities differ too much to be easily reduced to order and method. For while the courts have been desirous on the one hand to carry out the general purpose of the contract, as one of indemnity, they have been fettered on the other by the stipulations introduced as safeguards against fraud or malpractice and the conflict has arisen between the general design and the incongruity or unfitness of the means employed, which has at all periods formed one of the difficulties of the law. It is for instance well established that when the policy is conditioned to be void if the property is insured elsewhere, without the written consent of the insurers, the condition will not be satisfied by an oral license wanting the certainty which the provision was intended to secure, and throwing the whole open to the uncertain recollections of witnesses (ante, 881). *Hutchinson v. The Western Ins. Co.*, 21 Missouri, 971; *Patrick v. The Farmer's Ins. Co.*, 43 New Hampshire, 62; *Conway v. The Hudson River Ins. Co.*, 12 Cushing 144; *Minturn v. The Marine Ins. Co.*, 10 Gray, 501; *The Madison Ins. Co. v. Fellowes*, 1 Disney, 217, 2 Id. 128.

This will it has been said be true, even when the insured fails to take the necessary measures for his protection in consequence of the assurances of the officers or agents of the insurance company; and if redress is given under these circumstances in equity, it can only be on the ground of fraud clearly proved, and resulting in injury (ante, 881). *Barrett v. The Union M. F. Ins. Co.*, 7 Cushing, 175; *Carpenter v. The Washington Ins. Co.*, 4 Howard, 185, 223; *Richardson v. Evans*, 3 Maddox, 318. The main current of authority is in this direction, *Lowell v. The Middlesex Ins. Co.*, 8 Cushing, 127; *Forbes v. The Agawam Ins. Co.*, 9 Id. 474; *Minturn v. The Manufacturers' Ins.*

Co., 10 Gray, 504. And in *Minturn v. The Manufacturers' Ins. Co.*, the court said that when the policy requires the assent of the insurers to be in writing, it cannot be proved by oral evidence.

It has, notwithstanding, been held in a number of instances, that a renewal of the policy or the receipt of premium, with a knowledge of the circumstances, will preclude the insurers from taking advantage of a forfeiture incurred by a failure to make a necessary disclosure or statement, or to have the existence of a prior or subsequent insurance endorsed as the terms of the policy require. *The Insurance Co. v. Stackbower*, 2 Casey, 199; *Buckley v. Garret*, 11 Wright, 204; *The North Brunswick Ins. Co. v. The New England M. F. Ins. Co.*, 52 Maine, 336.

In these cases the waiver was subsequent to the breach, but the equity is no less clear when the acts or declarations of the insurer or his agents occasion the default of which he complains. *Carroll v. The Charter Oak Ins. Co.*, 38 Barb. 402; *Plumb v. The Cattaraugus Ins. Co.*, 18 New York, 392; *Rowley v. The Empire Ins. Co.*, 36 Id. 550, 3 Keyes, 557. In *Carroll v. The Charter Oak Ins. Co.*, the renewal of the insurance was held to preclude the insurers from alleging that it was avoided by the existence of another policy, notwithstanding the want of the written evidence which the language of the instrument required. The court cited and relied on the case of *Pierrepoint v. Barnard*, 2 Selden, 279 (ante, 593), where a vendee was allowed to set up an oral license to cut and carry away timber, as a justification, although the agreement under which he went into possession contained an express covenant that the trees should not be felled without an authority in writing from the vendor. And the general principle that a written contract may be waived orally at any time before breach; 1 Smith's Ldg. Cases, 555, 575, 6 Am. ed.; was said to apply even when the contract is under seal, or contains a stipulation that no change shall be made by parol. All, however, that the authorities cited to sustain this proposition establish, is, that an oral dispensation with the performance of a covenant may, like a license, to enter upon or occupy land, be a justification for acts done while it remains standing and unrevoked; and the point actually decided was, that the insurers could not take advantage of their laches in not endorsing a fact which had been fully communicated to them by the insured. See *Horwitz v. The Equitable Ins. Co.*, 40 Missouri, 557. The opinion of Gridley, J., who dissented from the judgment of the court, in *Pierrepoint v. Barnard*, contains an able vindication of the right of the parties to a contract to stipulate that their duties or liabilities shall not be varied or increased by any means less certain than those by which they were imposed; and such is clearly the rule of law, subject to the intervention of equity, when the letter of the instrument is used as a means of oppression or fraud. *West v. Blakeway*, 7 M. & G. 279; 1 Smith's Ldg. Cases, 557, 574, 575.



Similar decisions may be found in *Buckley v. Garret*, 11 Wright, 204; *Rowley v. The Empire Ins. Co.*, 40 New York, 557, and *Horwitz v. The Equitable Ins. Co.*, 40 Missouri, 557; while in *Helme v. The Philada. L. Ins. Co.*, 11 P. F. Smith, 107; the repeated acquiescence of the insurers in the non-payment of the premium at the prescribed period, was held to preclude them from enforcing a forfeiture arising from a subsequent want of punctuality. *Baker v. The Ins. Co.*, 4 Rob. 333.

The right to give evidence of acts or declarations, subsequent to the execution of the policy, and tending to excuse a breach of its provisions, is established on general principles and under these decisions. But an attempt to prove what occurred at, or before, the time when the instrument was executed, is in many respects governed by different considerations. It is well settled that when the contract is written, the writing is not only the best, but the sole evidence of the contract, and the parties will be presumed to have rejected everything that it does not contain. Policies of insurance are like other written instruments subject to this rule, and proof cannot ordinarily be adduced to vary their meaning, or show that the insurers agreed that the insurance should be valid notwithstanding the existence of a breach that would, agreeably to the terms of the instrument, render it void. *Barrett v. The Union Ins. Co.*, 7 Cushing, 175; *The Glendale Woollen Co. v. The Protection Ins. Co.*, 21 Connecticut, 19.

In *Barrett v. The Union Ins. Co.*, the defendants were accordingly allowed to take advantage of the failure of the policy to recite prior insurance, although the instrument had been prepared by them and delivered to the plaintiff, with a full knowledge on their part that the premises were insured elsewhere, and a belief on his that the objection was waived and would not invalidate the contract. The rule has been applied with equal strictness in a number of other instances, and the insured refused permission to show that the insurance was effected on the faith of an express or implied engagement to dispense with a condition precedent, or vary the writing in some other material particular. *Ruse v. The M. Ins. Co.*, 23 New York, 516; *The Liberty Hall Association v. The M. Ins. Co.*, 7 Gray, 261; *Kennedy v. The M. F. Ins. Co.*, Ib. 370; *Kennedy v. The St. Lawrence Ins. Co.*, 10, 289; *Jennings v. The Chenango Ins. Co.*, 2 Denio, 75; *Brown v. The Mutual Ins. Co.*, 18 New York, 385; *The State M. F. Ins. Co. v. Arthur*, 6 Casey, 315, 331; *The Conway Tool Co. v. The Hudson River Ins. Co.*, 12 Cushing, 144; *Lee v. The Howard Ins. Co.*, 3 Gray, 583; *Lowell v. The Middlesex Ins. Co.*, 8 Cushing, 127; *Forbes v. The Agawam Ins. Co.*, 9 Id. 474.

In *Lee v. The Howard Ins. Co.*, the application was signed by the plaintiff, on the faith of assurance from the agent who drew it up, that it was such a description of the premises as the provisions of the policy re-

quired, and contained all that was necessary to render the contract valid. The policy, which had been already executed in blank by the president and secretary of the insurance company, was then filled up by the agent, and delivered in pursuance of the instructions received from his principals, who had authorized him to make contracts of insurance without referring the risk to them. Under these circumstances it was contended, with much force, that when the agent undertook to prepare the description of the premises, it became his duty to prepare it correctly, and that no omission on his part should be allowed to affect the plaintiff, who had paid the premium under a well founded belief that he was effectually secured against loss.

But this argument was overruled by the court, who held that the insurance was invalidated by the failure of the application to disclose the specific use for which one of the buildings was employed, although being less hazardous than that actually set forth, it would not have occasioned an increase of premium if made known, and had consequently been disregarded as immaterial by the agent. In delivering judgment, Bigelow, J., said, "that upon the most familiar principle of the law of evidence, all previous verbal agreements must be taken to be merged in the written agreement of the parties made for the very purpose of embodying the terms of their contract, and designed to be the depository and proof of their final intention." But however true this may be in general, it meets with an exception, when the parties stand on unequal ground, and one of them uses his superior knowledge or influence to mislead the other as to the true import of the contract which he is about to sign. *The Woodbury Saving Bank v. The Charter Oak Ins. Co.*, 31 Connecticut, 517, 526. To misread a deed or state the contents falsely to an unlettered man is a fraud, for which redress may be given in a court of common law; *Thoroughgood's Case*, 2 Coke, 4, and equity will relieve for a like reason, when an erroneous impression is given of the legal effect of an instrument without misstating the words. *Hough v. The City Ins. Co.*, 29 Connecticut, 10. In *Harris v. The Protection Ins. Co.*, 18 Ohio, 116, the contract was accordingly reformed on proof that the plaintiff had been told by the defendant's agent that a covenant which bound the property was not an encumbrance, and need not be set forth in the application. And a similar course was pursued in *Moliere v. The Pennsylvania Ins. Co.*, 5 Rawle, 342, where the misdescription of the risk was due to the negligence or inadvertence of the secretary of the insurance company, and not to the inaccuracy of the representations made by the insured.

The reason assigned in *Lee v. The Howard Ins. Co.* would have been equally applicable if the transaction had been directly with the principals, and it is difficult to believe that a man who prepares and delivers a writing can rely on a forfeiture of his own creation. When

a contract is executed with a full knowledge of the failure of a condition precedent rendering it void, the breach may fairly be presumed to have been waived, because the whole is otherwise an unmeaning form that can answer no good purpose, and may deceive. See *Goodall v. The Atlantic Ins. Co.*, 35 New Hampshire, 328; *Carroll v. The Charter House Ins. Co.*, 38 Barb. 402; *Hough v. The City Ins. Co.*, 29 Connecticut, 10; *Ayres v. The Hartford Ins. Co.*, 17 Iowa, 176; 21 Id. 173; *Plumb v. The Cattaraugus Ins. Co.*, 18 New York, 392; *The Madison Ins. Co. v. Fellowes*, 11 Disney, 217; *Moses v. The Sun Ins. Co.*, 1 Duer, 151. If the receipt of the premium, with a knowledge of a forfeiture, will, as the cases establish, operate as an estoppel; *Buckley v. Garrett*, 11 Wright, 204; *Bouton v. The American M. L. Ins. Co.*, 25 Connecticut, 542; *Carroll v. The Charter House Ins. Co.*, 38 Barb.; the effect must be the same whether it is paid as a consideration for the execution of the policy, or for its renewal.

In *Beal v. The Park Ins. Co.*, 16 Wisconsin, 241, the court said that if the defendants took the premium and issued the policy knowing it to be void, it was a gross fraud, against which relief would be given on equitable principles, and the same principle was applied in *Bidwell v. The N. W. Ins. Co.*, 24 New York, 302. On the other hand in *The Madison Ins. Co. v. Fellowes*, 1 Disney, 217; 2 Id. 128; the weight of authority was said to be, that proof that the insurers were acquainted with the forfeiture, when they delivered the policy and took the premium, would not preclude them from treating the contract as invalid. If, however, a man can execute an instrument knowing it to be invalid, and then set it aside although no change has occurred, and when it is too late for the other party to recede, he certainly ought not to do anything to occasion the defect of which he complains. The better opinion would accordingly seem to be, that the insurers cannot take advantage of the misstatement or omission of any fact which it was their duty to set forth or state correctly, in view of all the circumstances; and that this will be true even when the defect occurs in an application for insurance or other document, which though signed by the insured is prepared by themselves, or by any one whom they have duly authorized, with a knowledge of or an opportunity to know all the material circumstances. *Rowley v. The Empire Ins. Co.*, 36 New York, 550; 40 Id. 557; *Peck v. The New London Ins. Co.*, 22 Connecticut, 575; *Beebe v. The Hartford M. F. Ins. Co.*, 25 Connecticut, 51; *The Iron Works v. The Phoenix Ins. Co.*, Ibid. 465; *The Bank v. The Charter Oak Ins. Co.*, 31 Id. 578; *The Perry City Ins. Co. v. Stewart*, 7 Harris, 45; *The Howard F. Ins. Co. v. Bruner*, 11 Id. 60; *The People's Ins. Co. v. Spencer*, 3 P. F. Smith, 353; *Franklin v. The Atlantic F. Ins. Co.*, 42 Missouri, 457; *Combs v. The Hannibal F. & M. Ins. Co.*, 43 Id. 148; *Masters v. The Madison Ins. Co.* 11 Barb. 624; *Beal v. The Park F. Ins. Co.*,

16 Wisconsin, 241; Flanders on Fire Insurance, 180. Thus in the *Howard Ins. Co. v. Bruner*, the defendants were held to be estopped from relying on a misdescription of the premises, by proof that the instrument was drawn by their agent after a full examination, while in *The Malleable Iron Works v. The Phoenix Ins. Co.*, 25 Connecticut, 465; the court said that an agent authorized to procure applications for insurance and furnished with printed interrogatories to be answered by the applicant, had an implied power to explain the meaning and effect of the questions asked and the answers which they required, and that an error or omission arising from his negligence or fraud could not be pleaded or given in evidence as a breach of warranty, by his principals. For like reasons a clause making the payment of the premium a condition precedent, without which the insurance will not take effect, may, it has been said, be controlled by an oral stipulation to the contrary on the part of a general agent of the insurers; *Sheldon v. The Atlantic F. & M. Ins. Co.*, 26 New York, 460; *Sheldon v. Connecticut M. Ins. Co.*, 25 Connecticut, 209; and it is established by these and many other cases, that when the insured is misled by the assurances or declarations of the agents of the insurers, equity will reform the contract, or a recovery may be had on the ground of equitable estoppel at law. *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Connecticut, 465; *Campbell v. The Union Ins. Co.*, 40 New Hampshire, 333; *Harris v. The Columbian M. Ins. Co.* 18 Ohio, 116; *Masters v. The Madison Ins. Co.*, 11 Barb. 624; *Plumb v. The Cattaraugus Ins. Co.*; *Beebe v. The Hartford Ins. Co.* The principle has generally been used to excuse a breach of warranty, growing out of the questions propounded by the insurers. But it will apply wherever the insurers seek to take advantage of a forfeiture of their own creation or a default which they have directly or indirectly shared. *The Atlantic Ins. Co. v. Goodall*, 25 New Hampshire, 320; 9 Foster, 182; *Buck v. The United States Ins. Co.*, 18 Barb. 541; *The New York Ins. Co. v. The National Ins. Co.*, 20 Id. 469; *Bouton v. The American Ins. Co.*, 25 Connecticut, 542; *Sheldon v. The Connecticut Ins. Co.*, Ib. 207.

In *Crane v. The National Ins. Co.*, 16 Maryland, 269, the court said that all that the insured can do is to make the necessary disclosures and representations. The preparation of the policy then devolves on the insurers in the ordinary course of business, who must determine whether they will reject the risk or accept it, and draw the instrument in accordance with the information furnished for their guidance. If they fail in the performance of this duty, the error will be theirs, and should not be set down to the account of the insured. The insurers were accordingly held liable, on proof that they had been duly informed that the property was insured elsewhere, although no memorandum was made on the policy as its terms required. So in *Rathbone v. The City*

*Ins. Co.*, 31 Connecticut, 193, a recovery was allowed on proof that the plaintiff had varied the risk in reliance on a promise by a general agent of the insurers that the change should be properly endorsed in writing. For a like reason where there is no concealment or misrepresentation on the part of the insured, a mis-description of the risk in a policy or survey prepared by the insurers or their agents, will not be a forfeiture or avoid the contract. *Beal v. The Park Ins. Co.*, 16 Wisconsin, 241; *Moliere v. The Pennsylvania Ins. Co.*, 5 Rawle, 342; *Combs v. The Hannabal*, 43 Missouri, 148; *Bartholomew v. The Merchants Ins. Co.*, 25 Iowa, 507.

To obviate this doctrine, the insured is ingeniously required in most policies framed at the present day to present a description of the risk which, coming from him, shall be his act, and not that of the insurers. But the difficulty recurred in an unexpected form, through the interested or officious zeal of the agents employed by the insurance companies, who, in the wish to outbid each other and procure customers, not unfrequently mislead the insured by a false or erroneous statement of what the application should contain, or taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. *Rowley v. The Empire Ins. Co.*, 36 New York, 281; 40 Id. 557. The better opinion seems to be that when this course is pursued the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers. *Masters v. The Madison Co. M. Ins. Co.*, 11 Barb. 624; *The Woodbury Savings' Bank v. The Charter Oak Ins. Co.*, 31 Id. 517; *The Columbia Ins. Co. v. Cooper*, 14 Wright, 331; *The Malleable Iron Works v. The Phoenix Ins. Co.*, 25 Connecticut, 465; unless the insured knows that the agent is exceeding the authority given him by his principal. If corporations are astute in contriving such provisions, the courts should take care that they are not used as instruments of fraud and injustice. The point is, however, still in dispute, and has been decided the other way in various instances. *Barrett v. The Union Ins. Co.*, 7 Cushing, 175; *Lee v. The Howard Ins. Co.*, 3 Gray, 583; *Abbott v. The Shawmut Ins. Co.*, 3 Allen, 213; *Mulrey v. The Shawmut M. F. Ins. Co.*, 4 Id. 116; *Flanders on Fire Ins.* 190.

The question should, as it would seem, depend on whether the conduct of the insurers or of their duly authorized agents, was such an actual or constructive fraud as to justify the interference of equity to reform the contract, or enjoin the defendants from profiting by their breach of faith; *Crane v. The National Ins. Co.*, 16 Maryland, 269; *Wheelston v. Hardisty*, 8 Ellis & Bl. 232; *Noonan v. The Hartford Ins. Co.*, 21 Missouri, 81; because unless they are precluded on these or other equivalent grounds they will clearly be entitled to insist on the

letter of the contract, and refuse to give effect to a statement or notice not made in the form or substantiated in the manner which the policy requires. *Hutchinson v. The Western Ins. Co.*, 21 Missouri, 97. In *Carpenter v. The Washington Ins. Co.*, 4 Howard, 185, a bill was filed to compel the defendants to endorse a notice of a subsequent insurance which they were alleged to have received, and thus obviate one of the difficulties which had prevented a recovery against them at law (ante, 881). The court refused to make such a decree, because the case was not sufficiently proved to outweigh the positive denial of the defendants; but they were obviously of opinion that if the allegations of the bill had been substantiated, the plaintiffs would have been entitled to the relief for which they prayed. In the *National Insurance Co. v. Crane*, 16 Maryland, 260, the failure of the defendants to endorse a prior insurance which had been duly communicated, was accordingly held not to be a defence in equity, whatever might be its effect at law. The court said, that when a contract is drawn by the party to be charged, his conduct should be more strictly scrutinized than under ordinary circumstances. And there can be little doubt that when an oral dispensation with the necessity for a written license has been so far acted on that it cannot be withdrawn without injury, relief should be given in equity, or through the aid of an equitable estoppel. *Pierrepont v. Baryard*, 2 Selden, 79; *The Atlantic Insurance Co. v. Goodall*, 35 New Hampshire, 328; *Rowley v. The Empire Ins. Co.*, 36 New York, 285, 40 Id. 557.

The principle is the same where the insurers directly or through others lead the insured to disregard the terms of the contract by a promise that they will not be enforced, which is proved with sufficient clearness to justify the intervention of a chancellor, or operate as an equitable estoppel in a court of law. *Wood v. Dwarris*, 11 Exchequer, 493; *Campbell v. The Merchants' Ins. Co.*, 37 New Hampshire, 35; *Goodall v. The Atlantic Ins. Co.*, 35 Id. 328; *Patton v. The Madison Ins. Co.*, 40 Id. 375. In *Wood v. Dwarris*, a prospectus issued by the defendants stating that no policy issued by them should be disputed except for fraud, was held to be a good answer to a plea that the policy had been avoided by an innocent concealment on the part of the insured. And although in the subsequent case of *Wheelton v. Hardisty*, 8 Ellis & Bl. 232, 287, the court were divided in opinion on a similar question, they might have agreed if it had appeared that the prospectus was seen by the plaintiff, and influenced his judgment. 1 Smith's Leading Cases, 790, 6 Am. ed. In *Ruse v. The N. Y. Ins. Co.*, 26 Barb. 526; 23 New York, 516, however, the Court of Appeals, reversing the decision of the court below, held, that anterior declarations will, even when made publicly through the press, be presumed to have been merged in the policy as finally executed, which, if true in general, is

as Lord Campbell intimated in *Wheelton v. Hardisty*, hardly applicable where the declaration is in writing and professedly intended to control the deed instead of being controlled by it. 2 Smith's Leading Cases, 759, 6th Am. ed.; *Collet v. Morrison*, 12 English Law & Equity, 171. It is no doubt true in general that the meaning of a written contract must be drawn from the instrument without regard to prior or contemporaneous declarations, although express and forming part of the *res gestæ*; and relief will not, ordinarily, be given in equity, even where there is reason to believe that the complainant was misled by the assurances of the party who insists on a literal adherence to the writing. *Lord Irnham v. Child*, 1 Brown Ch. 92; *Mordaunt v. Maxwell*, 1 Peere Williams, 681; *Howard v. Thomas*, 12 Ohio, N. S. 291; *Watkins v. Stackett*, 6 Harris & Johnson, 435; *The Bank of Westminster v. White*, 1 Maryland Ch. 539; *Arty v. Grove*, 21 Maryland, 454, 747. When, however, the answer admits that such a stipulation was made, equity may relieve, and the case would seem to be nearly the same in principle when the collateral stipulation is printed or reduced to writing, and is in terms or by necessary implication not to be merged in the contract as subsequently executed. Under those circumstances it is as much a part of the deed as if it were expressly set forth or referred to. Accordingly in *Goodall v. The Atlantic Ins. Co.*, 35 New Hampshire, 328; 9 Foster, 182; a condition that if the premises were insured elsewhere, the policy should be void, was held to be waived by a contemporaneous assurance that the plaintiff should not be precluded by the existence of a policy which he had effected in another company if it was cancelled within a reasonable time.

Whatever the rule may be under ordinary circumstances it would seem clear that when the duty of preparing the policy is, as generally happens, assumed by the insurers, they cannot take advantage of the failure of the instrument to express any fact or circumstance that has been duly communicated by the insured, and omitted through negligence or design by their officers or agents. *Moliere v. The Protection Ins. Co.*, 5 Rawle, 342; *Mulison Insurance Co. v. Fellows*, 1 Disney, 217; *Ayres v. The Home Ins. Co.*, 21 Iowa, 185; *Ayres v. The Hartford Ins. Co.*, 17 Id. 176; 21 Id. 193; *The Woodbury Savings Bank v. The Charter Oak Insurance Co.*, 31 Connecticut, 517. And the principle is the same when the error or misdescription occurs in an application or survey, which though nominally proceeding from the insured is in fact prepared or dictated by an agent of the insurance company. *Deal v. The Park Ins. Co.*, 16 Wisconsin, 241; *Plumb v. The Cattaraugus Ins. Co.*, 18 New York, 392; *Rowley v. The Empire Ins. Co.*, 36 Id. 550; *The Howard Insurance Co. v. Bruner*, 11 Harris, 60; *Ayres v. The Hartford Ins. Co.*; *The Malleable Iron Works v. The Phoenix Ins. Co.*, 25 Connecticut, 465. The appropriate remedy under these circumstances is an

equitable reformation of the contract; *Molliere v. The Pennsylvania Ins. Co.*; *The National Ins. Co. v. Crane*, 16 Maryland, 260; *The Woodbury Savings Bank v. The Charter Oak Ins. Co.*, but relief may also be given at law on the ground of equitable estoppel. *Plumb v. The Cattaraugus Ins. Co.*; *Rowley v. The Empire Ins. Co.*; *Ayres v. The Home Ins. Co.*; *Beal v. The Park Ins. Co.*

The rule that a written contract cannot be varied by prior or contemporaneous stipulations not incorporated with its terms, does not apply when such proof is adduced to excuse a breach, or establish a subsequent modification of the contract; and a forfeiture resulting from the violation of a condition may accordingly be cured by evidence that would not suffice to vary or discharge the contract in itself (ante, 593). It has accordingly been held and is generally conceded that a failure to give notice of the loss, or furnish the requisite preliminary proof; *The Protection Ins. Co. v. Harmer*, 2 Ohio, N. S. 262; *Taylor v. The Merchants' F. Ins. Co.*, 9 Howard, 390; *Lewis v. The Monmouth Ins. Co.*, 52 Maine, 492; *The Commonwealth Ins. Co. v. Sennett*, 41 Pennsylvania, 161; *Clark v. The New England F. Ins. Co.*, 6 Cushing, 342; *Francis v. The Ocean Ins. Co.*, 6 Cowen, 404; *The Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Bodle v. The Chenango M. Ins. Co.*, 2 Comstock, 53; *Peoria F. and M. Ins. Co. v. Lewis*, 18 Illinois, 553; *Kernochan v. The N. Y. Bowery Ins. Co.*, 17 New York, 628; *Ames v. The N. Y. Union Ins. Co.*, 4 Kernan, 253; *Bartlett v. The Union Ins. Co.*, 46 Maine, 502; *Peoria Ins. Co. v. Hall*, 12 Michigan, 202; *Priest v. The Citizens' Ins. Co.*, 3 Allen, 602; to sue within the period limited by the policy, as that after which no action shall be brought; *Grant v. The Lexington Ins. Co.*, 5 Indiana, 23; *Ames v. The New York Ins. Co.*, 14 New York, 253; or even to have a subsequent or pre-existing insurance or incumbrance duly endorsed; *The Atlantic Ins. Co. v. Goodall*, 35 New Hampshire, 328; *Ames v. The York Union Ins. Co.*, 4 Kernan, 253; *The Insurance Co. v. Stockbower*, 2 Casey, 199; *Buckley v. Garrett*, 11 Wright, 204; may be waived or excused by acts or declarations of a nature to induce the belief that the omission is immaterial, or that nothing more will in view of all the circumstances be required; *The Lycoming Ins. Co. v. Schellenberger*, 8 Wright, 259. But although this is true, while the condition is still running and might be performed, it ceases to be so when the breach is complete and the contract void, unless there is some new consideration, *Ripley v. The Aetna Ins. Co.*, 30 New York, 136; *Diehl v. The Adams Co. Ins. Co.*, 8 P. F. Smith, 443, 452; which may, however, arise from the receipt of the premium with a knowledge of the forfeiture. *The Lycoming Ins. Co. v. Stocklomm*, 3 Grant, 207 (ante, 912).

Accordingly, where the policy required immediate notice of the loss, and it was not sent until eleven days afterwards, the court held the for-



feiture absolute, and that it was not waived by a failure to object at the time or until suit brought, because the period for the performance of the condition had gone by, and the silence of the insurers could not prejudice the insured. *Trask v. The State Ins. Co.*, 5 Casey, 198. See *Edwards v. The Baltimore F. Ins. Co.*, 3 Gill, 176.

To render the acts or declarations of an agent binding on the principal, they must be within the scope of the powers or duty of the agent. *Hanson v. The City M. F. Ins. Co.*, 9 Allen, 231; *Mitchell v. The Lycoming Ins. Co.*, 1 P. F. Smith, 402. An authority to solicit and receive applications for insurance does not confer an authority to draw them, or vary the terms of the contract orally to the prejudice of the principal. *Wilson v. The Conway F. Ins. Co.*, 4 Rhode Island, 141. That the answers of the insured were prepared or dictated by an agent of the insurance company, will not therefore necessarily excuse the suppression or misstatement of a material fact, or preclude the company from relying on the error as a breach of the condition of the policy. *Wilson v. The Conway F. Ins. Co.*; *Ayres v. The Hartford Ins. Co.*, 17 Iowa, 176, 190; 21 Id. 193; *Ayres v. The Home Ins. Co.*, 21 Iowa, 185; and the question will, under these circumstances, depend on whether the agent was acting within the general scope of the authority given by the principal, for otherwise he must, relatively to the matter in hand, be considered as the agent of the insured, and not of the insurers. A man who employs the agent of another makes him his own, and may be as much bound by what he does as if he had no other principal; *Smith v. The Empire Ins. Co.*, 25 Barb. 497; *Wilson v. The Conway Fire Ins. Co.*; *The State F. Ins. Co.*, *Arthur*, 6 Casey, 315; 1 Smith's Ldg. Cases, 791, 6 Am. ed.; and such is manifestly the rule when the policy contains a provision that the agent through whom the insurance is effected or application made, shall be regarded as the agent of the insured, and not of the insurer. *Abbott v. The Shawmut Ins. Co.*, 3 Allen, 213.

There are, however, other and collateral truths which should be kept in view in cases of this description. It has been held, and is well settled, that a principal is liable for the fraud of his agent in the course of the business intrusted to his care; and it will not be an answer that he did not authorize the fraud, if he authorized the act in the course of which the fraud was committed. 1 Smith's Ldg. Cases, 329, 6 Am. ed.; *Fogg v. Griffin*, 2 Allen, 1. And it would seem that a man cannot adopt or profit by a contract without becoming responsible for the means through which it was procured, although they may have been used without his knowledge, or contrary to his express commands. *Bennett v. Judson*, 21 New York, 238; *Elwell v. Chamberlain*, 4 Bosworth, 320; *Udell v. Atherton*, 7 Exchequer, 171; *The Malleable Iron Works v. The Phoenix Ins. Co.*, 25 Conn. 465; 1 Smith's Ldg. Cases, 329, 6 Am. ed.; *Beebee*

v. *The Hartford Co. M. F. Ins. Co.*, 25 Conn. 51. He may no doubt return what he has received within a reasonable time, and rescind the contract; but this cannot be done after a breach has occurred, and when it is too late to restore the other party to his original position. See *Udell v. Atherton*; *Hodsdon v. The Guardian Ins. Co.*, 97 Mass. 284. In *Fogg v. Griffin*, the court said that a corporation could only act through its officers and agents, and if they were guilty of fraud in exercising the power thus conferred, the principal would be liable for the consequences. The authorities accordingly agree, that when the alleged defect or breach is due to the negligence or misstatements of the officers or agents of the company acting within the limits of their powers, and in their appropriate sphere, it will not be a defence to an action on the policy. *Rowley v. The Empire Ins. Co.*, 36 New York, 550; *Drury v. The Conway Ins. Co.*, 13 Gray, 492; *The Liberty Hall Association v. The Housatonic M. F. Ins. Co.*, Ibid. 261; *Wilson v. The Conway M. F. Ins. Co.*, 4 Rhode Island, 141; *Hough v. The City Ins. Co.*, 29 Conn. 10; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Id. 517, 526; *Beebe v. The Hartford M. F. Ins. Co.*, 25 Conn. 51, 141; *The Belleville Ins. Co. v. Van Winkle*, 1 Beasley, 333.

And it has been held, that when an insurance company deals with the community through a local agency, persons having transactions with the company are entitled to assume that the acts and declarations of the agent are as valid as if they proceeded directly from the principals; *Beale v. The Park Ins. Co.*, 16 Wisconsin, 241; *Keeler v. The Niagara Co.*, Ib. 525; *Beebe v. The Hartford M. F. Ins. Co.*, 25 Connecticut, 51; *Shelden v. The Connecticut M. F. Ins. Co.*, Ib. 29; *The Washington Savings Bank v. The Charter Oak Ins. Co.*, 31 Connecticut, 517, 527. In *Conway v. The Ins. Co.*, 4 Rhode Island, 141. Ames, C. J., said, that an agent employed to obtain and forward applications for insurance was not thereby authorized to draw them, and that if he was employed for that purpose by the insured the insurers could not justly be held responsible for his mistakes or omissions. But it was at the same time held that if such an agent instead of forwarding the application presented by the insured, sends another which the latter has not prepared or authorized, the defects which it contains cannot be taken advantage of by his principals, and that the result will be the same, when the agent after promising to draw the application in accordance with data to be thereafter furnished by the insured, transmits an inaccurate description of the premises taken from documents already in his possession, and for the correctness of which the insured is not responsible. It has been held, in like manner, in Iowa, that the failure of the local agents of the insurers to take down the statements of the insured correctly, will not excuse a misdescription of the premises, rendering the policy void, unless he is a general agent,

authorized to pass upon and accept risks, without consulting his principals. *Ayres v. The Home Ins. Co.*, 21 Iowa, 185; *Ayres v. The Hartford Ins. Co.*, 17 Id. 176; 21 Id. 193. This distinction which seems to have been recognized in *Rowley v. The Empire Ins. Co.*, 36 New York, 550, may be sound when the action is *ex contractu* on the policy, because when a risk is presented to an agent who has no power to contract, in one aspect, and laid by him before his principal in another, the minds of the parties do not meet on the same subject matter, and although the agreement may be rescinded it cannot be reformed. Still, even under these circumstances, an action on the case would probably lie against the principal for the fraud or negligence of the agent, and if so, he may be equitably estopped from relying on the forfeiture as a defence to the contract. *Beal v. The Park Ins. Co.*, 16 Wisconsin, 241.

It is sufficiently obvious that the silence or acquiescence of the agent, or his failure to point out the errors of the description given by the insured, will not, even when attended with full knowledge, preclude the insurers from enforcing a forfeiture growing out of a breach of the conditions of the policy; *Kimball v. The Howard Ins. Co.*, 8 Gray, 83; *Vose v. The Eagle Ins. Co.*, 6 Cushing, 42; *Tibbetts v. The Hamilton Ins. Co.*, 3 Allen, 560; *Miller v. The Hamilton Ins. Co.*, 17 New York, 609; *The State M. L. Ins. Co. v. Arthur*, 6 Casey; *Chase v. The Hamilton Ins. Co.*, 20 New York, 52; unless the agent is authorized to make contracts of insurance, when his acceptance of the application may operate as an acceptance of the risk; *Campbell v. The M. Ins. Co.*, 37 New Hampshire, 35; *Ayres v. The Insurance Co.*, 17 Iowa, 176, or the defence rests on the ground of misrepresentation or concealment as distinguished from a breach of warranty. *Patten v. The Merchants' Ins. Co.*, 40 New Hampshire, 375.

Cases may, however, be found in which the knowledge of the agent has been treated as the knowledge of the principal, and a sufficient excuse for a breach of which the agent was informed at the time of issuing or renewing the policy. *Horwitz v. The Equitable Ins. Co.*, 40 Missouri, 557; *Barnes v. The Union Ins. Co.*, 45 New Hampshire, 21; *The Ins. Co. v. Hall*, 12 Michigan, 202; *The Howard Ins. Co. v. Bruner*, 11 Harris, 50; *Campbell v. The M. Ins. Co.*, 37 New Hamp. 35. *McEwen v. The Montgomery Co. M. Ins. Co.*, 5 Hall, 101; *Keeler v. The Niagara Ins. Co.*, 16 Wis. 523; *The F. & M. Ins. Co. v. Schettler*, 38 Illinois, 166. And there can be little doubt that when an agent employed by the insurers to survey the premises, makes a false or inaccurate report to his principals in consequence of which the policy is prepared by them subject to conditions that are already broken or cannot be fulfilled, the instrument will be reformed in equity or the principals may be equitably estopped from showing its want of conformity with the truth. *Beal v. The Park Ins. Co.*, 16 Wis. 241; *The Howard F. Ins. Co. v.*

*Spooner*, 11 Harris, 60; *The Perry Co. Ins. Co. v. Stewart*, 7 Id. 45; *The Columbia Ins. Co. v. Cooper*, 14 Wright, 331; *Campbell v. The M. Ins. Co.*

The powers of an agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations which are not communicated to the person with whom he deals. *Beebe v. The Hartford Ins. Co.*, 25 Conn. 251; *The Woodbury Savings Bank v. The Charter Oak Ins. Co.*, 31 Id. 517, 529; *The Lycoming Ins. Co. v. Shollenberg*, 8 Wright, 259; *Beal v. The Park Ins. Co.*, 16 Wis. 241; *City of Davenport v. The Peoria Ins. Co.*, 17 Iowa, 274. But the principal will not be bound by the acts or knowledge of the agent beyond the scope of the purpose for which he is employed, or contrary to a restriction on his authority known to the other party to the contract. *Hanson v. The City Ins. Co.* 9 Allen 231; *Robb v. The Hamilton Ins. Co.* 11 Gray, 103; *Carroll v. The Charter Oak Ins. Co.* And this is equally true of the president and other officers of a joint stock society, or body corporate, who may bind the company within, but not beyond, the limits of their authority as conferred by the charter or articles of association. *Tillinghast v. The New York Ins. Co.*, 8 Bosworth, 281. And it has been repeatedly held that the directors and officers of mutual insurance companies being agents whose powers are limited, cannot waive any of the conditions or instructions imposed by the by-laws, except in the way prescribed. *Hill v. The Mechanics' M. Ins. Co.*, 6 Gray, 169; *Brewer v. The Chelsea Ins. Co.*, 14 Id. 203; *Evans v. The M. Ins. Co.*, 9 Allen, 329. In *Evans v. The M. Ins. Co.*, the court said that the officers of such companies have no power to vary any of the conditions or stipulations of the policy, or to do that orally which the contract requires to be in writing, although they may waive a provision which does not touch the substance of the contract and only concerns the proof of loss. *Smith v. The M. F. Ins. Co.*, 12 Harris, 120; *Treadway v. The Hamilton Ins. Co.*, 29 Conn. 68; *Mitchell v. The Lycoming Ins. Co.*, 1 P. F. Smith, 402, 411; *Brewer v. The Chelsea M. Ins. Co.*, 29 Conn. 68. And in *Smith v. The Mutual Fire Ins. Co.*, the agents of an incorporated mutual insurance company were said to be also the agents of the insured, who must therefore take the consequences of their mistakes. This distinction may serve to explain cases that might otherwise seem to be irreconcilable; but the point was decided the other way in *Masters v. The Madison Co. M. Ins. Co.*, 11 Barb. 624; *The Columbia Ins. Co. v. Cooper*, 14 Wright, 331; and *Cumberland Valley Ins. Co. v. Schell*, 5 Casey, 451.

To render a waiver binding it must be supported by a consideration; *Trask v. The M. Ins. Co.*, 5 Casey, 198; *Ridley v. The Ætna Ins. Co.*, 30 New York, 136; which may be found before breach in a failure to comply with the condition induced by the license

given by the insurers, but can only arise after breach, from a payment made or assumed, or some other act done or forborne on the part of the insured, in pursuance of the express or implied request of the insurers (ante, 920). An assurance that a policy shall be good, notwithstanding a forfeiture which has already been incurred, may, however, operate as a waiver or estoppel, if attended by circumstances warranting the presumption that induced the plaintiff to vacate an insurance in another office, or abstain from taking out a new policy. *Goodall v. The Atlantic Ins. Co.*, 35 New Hampshire, 328. And when the insured might by paying the premium at the time prescribed, or cancelling a prior insurance, render the policy valid, and would adopt that course but for an assurance by the officers or agents of the insurance company that a strict or punctual performance is not requisite, the injury which he would sustain if the policy were avoided is a reason why it should be enforced. *Sheldon v. The Conn. Ins. Co.*, 25 Connecticut, 207; *The Atlantic Ins. Co. v. Goodall*, 35 New Hampshire, 328. Where, however, a loss has actually occurred, this reasoning is no longer applicable, and a waiver will then come too late to cure a forfeiture growing out of a previous breach. *Trask v. The M. Ins. Co.*

The validity of a condition that a recovery shall not be had unless suit is brought on the policy within a year or six months from the loss, has been denied in some instances, but is now too well established to be a subject of dispute. *Fulton v. The New York Ins. Co.*, 7 Gray, 61; *The Ins. Co. v. The Phoenix Oil Co.*, 7 Casey, 448; *Amesbury v. The Bowditch Ins. Co.*, 6 Gray, 596; *Brown v. The Roger Williams Ins. Co.*, 7 Rhode Island, 394; *Brown v. The Savannah M. Ins. Co.*, 24 Georgia, 97; *The Portage Ins. Co. v. West*, 6 Ohio, N. S. 599; *Gray v. The Hartford Ins. Co.*, 11 Blatchford, 280; *Trunelli v. The Lafayette Ins. Co.*, 5 McLean, 461. When, however, the restraint is unreasonable or oppressive in point of time or place, it will be void. *The Eagle Ins. Co. v. The Lafayette Ins. Co.*, 9 Indiana, 443; and a proviso that the insurers shall not be sued beyond the limits of the county in which they reside, or have their place of business, will be invalid as contravening this principle. *Nute v. The Hamilton M. Ins. Co.*, 6 Gray, 138; *Hall v. The People's Ins. Co.*, 1b. 185; *Bartlett v. The Union Ins. Co.*, 46 Maine, 500.

In *The Tennessee M. F. Ins. Co. v. Mudge*, 14 Missouri, 46, and *Eddy v. The Tennessee M. F. Ins. Co.*, 21 Id. 587, the rule in *Dumpor's Case* (2 Coke, 119; 1 Smith's Leading Cases, 85, 6 Am. ed.), that a condition once waived is wholly gone, was said to be limited to grants of land and incorporeal hereditaments, and it was consequently decided, that a stipulation that a fire or marine insurance shall be avoided by alienation, will continue in force notwithstanding a license to assign, and preclude the assignee from making a farther transfer without the consent of the insurers.

## INSURABLE INTEREST. REPRESENTATION.

JOSEPH LOCKE *v.* THE NORTH AMERICAN INSURANCE COMPANY.

In the Supreme Court of Massachusetts.

MARCH TERM, 1816.

[REPORTED 13 MASSACHUSETTS, 61-68.]

*An equitable interest may be insured without informing the insurer that the legal title is vested in a third person, as security for the payment of a debt. And the holder of the legal title may be called as a witness for the purpose of proving that he holds it as a security, and not absolutely.*

*It seems that no statement need be made to the insurer, of the nature or character of the interest insured, even when it does not consist in the absolute ownership of the property covered by the insurance, and is merely equitable or contingent.*

[\*THIS action was brought on a policy of insurance, effected on behalf of the plaintiff, "on property on board the sloop General Greene, at and from Boston to Albany," to recover for a total loss by capture during the voyage.

It appeared at the trial, that the money employed in the purchase of the fish composing the cargo of the sloop, had been advanced to the plaintiff by one Barnard, subject to an understanding that the purchase and shipment, should be made in the name of the latter as security for the loan. This understanding was carried into effect at the time of the shipment, and the bill of lading and invoice were both made out in the name of Barnard; who was called as a witness on behalf of the plaintiff, for the purpose of stating these facts, and explaining the real nature of the interest of the latter in the property insured. An objection was taken to his competency by the defendant, which was overruled, and his testimony admitted. In addition to the facts above stated, he further proved, that at the period of the application for the insurance, which had

\* The syllabus and statement of the reporter are omitted.

been made by him in person, he had stated in answer to a question by one of the officers of the company, that the goods belonged to the plaintiff whom he considered as the real owner under the relations existing between them. But he made no statement, nor was there any inquiry, with regard to the nature and extent of the interest held by the latter, in the subject matter of the insurance.

Under these circumstances, a verdict was taken for the plaintiff, subject to the opinion of the court on the questions of law arising on the facts, as reported by the judge, which was subsequently delivered by]—

PARKER, C. J. All the facts necessary to be proved, to entitle the plaintiff to recover, appear to have been established at the trial; provided an insurable interest existed in him, and there was no concealment of any material fact at the time the insurance was effected. If these two points are in the plaintiff's favor, judgment is to be rendered upon the verdict; unless Barnard, a witness examined at the trial, was incompetent, from interest in the cause, and ought to have been rejected.

As the proof of interest depends in some measure upon the testimony of this witness, it will be proper first to settle the question of his competency. The objection to it rests upon the interest which he had in the property insured, and in the policy which was effected upon it. He had advanced the money with which the plaintiff purchased the cargo; the legal title of it was in the witness: the bill of lading, and all other documents necessary for the voyage, were in his name. But the witness for the defendants, by whom Barnard's interest is to be proved, testified that he stated the property to be the plaintiff's. And it may well be, that the title is apparently in one, while another has all the equitable interest; as in the case of personal chattels mortgaged, where he who holds the property may have no interest in an insurance upon it, having collateral security upon which he may rely. It does not appear, therefore, conclusively, from the testimony of the secretary of the company, that Barnard was interested in the event of the suit; and from the testimony of Barnard himself, although it is manifest that he is deeply interested in the question, yet it does not appear that he is directly interested in the event of the suit; for his debt will remain

against the plaintiff, notwithstanding there may be no recovery upon this policy.

On the next question which respects the insurable interest in the plaintiff, we think there can be no doubt. The property was really his, although the legal control of it was in Barnard; it was shipped on his account and risk; and he merely owed a debt to Barnard, which his property was pledged to secure. His interest is the same as it would have been, had the purchase been made in his own name, and the bill of lading in his favor, and he had then endorsed the bill of lading, and signed other papers necessary to transfer the property as a pledge to Barnard.

It is not now to be disputed, that several persons; having several interests in property, may insure to the full value of the interest. There are numerous cases settling this point. But the great question is, whether one, having an equitable interest in property, the legal title to which is in another, may make insurance upon the property generally, without representing the interest he has, so that the underwriters may know the exact state of the subject matter of their contract; and, whether, if such representation is not made, there is not a concealment of material facts which will avoid the policy.

It seems to us, that, upon general principles, it would be right, that such should be the law; but we are to inquire, what has been settled and practiced upon according to usage and judicial decision, in order to ascertain the law of mercantile contracts.

As the contingency of damage to property insured, which may justify an abandonment and claim for a total loss, although the subject matter of the contract remains entire, is too frequent not to enter into the contemplation of the contracting parties; it would seem, that when a man causes an insurance upon property in which he has an interest, but not such a title as will authorize him to transfer it by abandonment, this fact ought to be made known, that the underwriter may determine whether he will take the risk under such circumstances or not. Still, we do not find, that such representation has been deemed essential in England, in the several cases where insurance upon qualified property has been established, nor in this State, although several cases have occurred which seemed necessarily to present such a question to the court.

Under these circumstances, we do not feel ourself authorized to introduce what may be deemed a new principle, however useful



it might have been, if early introduced into the law of insurance. We are satisfied, as the law stands, that a *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured; unless there should be a false affirmation or representation, or a concealment, after inquiry, of the true state of the property.

We are the less disposed to depart from what appears to have been generally understood and received as the law and practice upon this subject, from a persuasion that underwriters can, in no event, be injured thereby. For the assured, when he cannot, by abandoning, transfer the legal title to the underwriters, will be confined to an actual indemnity. Thus, if there should be salvage, which the person having the legal title to the property, or those who may have insured it for him, shall claim as belonging to them, the underwriter for him who has the equitable interest, will be holden to pay only what is actually lost; the assured being in that case indemnified for the residue by the salvage, which is in fact received to his use, by the party to whom he is indebted.

The case of Carroll et al. v. The Boston Marine Insurance Company, which has been cited by the counsel for the defendants, differs materially from the case now before us. For, in that case, the conveyance of the vessel to Waterman was made by deed, and the attempt was to show a property in Carroll, contrary to the face of the deed; and it was justly holden, that he should not set up an interest in property so conveyed, contrary to the evidence of title by such documents, in order to charge the underwriters.

In the case at bar, the transaction between the plaintiff and Barnard was a fair one. Barnard purchased and paid for the property, and held it in his name, with a view to enable the plaintiff to make some profit with it; and the real character of the transaction is the same as if the plaintiff had borrowed money of Barnard to purchase the property, and had then pledged it to secure the money advanced. In such case, Barnard having the legal title, might insure his interest; and the plaintiff having an equitable interest, might insure that.

We have before observed, that an actual designed concealment of the nature of the interest insured would avoid the policy. But we think that this cannot be considered as proved, with respect

to this particular subject of insurance, without a direct false affirmation as to the nature of the property, or a refusal to answer truly upon inquiry. In most cases, it is entirely immaterial to the underwriter; and, if it is important for him to know, he may always insist upon a satisfactory exhibition of title, or refuse to enter into the contract.

Upon these grounds, we are of opinion that the verdict is right; and judgment must accordingly be entered upon it.

It is in general sufficient, if the subject matter of the insurance, and the nature of the risk, are set forth in the policy, without stating the nature or character of the interest for which the insurance is intended as a protection. *The Protection Ins. Co. v. Harmer*, 2 Ohio, N. S. 452, 474. The rule is given in this form by Mr. Angell on the authority of a former edition of this work, and it was cited and approved by the Supreme Court of Ohio in *The Protection Ins. Co. v. Harmer*.

The doctrine held on this point, in the case of *Locke v. The N. A. Ins. Co.*, is well settled, both in this country and in England, and is supported by a great number of cases which establish that a recovery may be had under general words of insurance, on proof of any interest, however indirect in the property insured, which has been lost or endangered by the injury for which the plaintiff demands compensation. *Buck v. The Chesapeake Ins. Co.*, 1 Peters, 151. *The Columbian Ins. Co. v. Lawrence*, 2 Peters, 25; 10 Id. 507; *Higginson v. Dall*, 13 Mass. 96; *Bartlett v. Walter*, Ib. 267; *Gordon v. The F. and M. Ins. Co.*, 2 Pick. 249; *Lazarus v. The Commonwealth Ins. Co.*, 5 Id. 76 (ante, 541); 19 Id. 81; *Wiggin v. The Mercantile Ins. Co.*, 7 Id. 271; *Bixby v. The Franklin Ins. Co.*, 8 Id. 86; *Strong v. The Manufacturers' Ins. Co.*, 10 Id. 40; *Kenny v. Vanhorne*, 1 Johnson, 385; *Tyler v. The Ætna Fire Ins. Co.*, 12 Wendell, 512; *The Ætna Fire Ins. Co. v. Tyler*, 16 Id. 385; *Swift v. The Vermont M. F. Ins. Co.*, 18 Vermont, 304; *Trumbull v. The Portage M. F. Ins. Co.*, 12 Ohio, 305; *Varian v. The Canal Ins. Co.*, 10 Id. 323; *The Ins. Co. v. Woodruff*, 2 Dutcher, 541, 552.

This course of decision is strikingly exemplified by the case of *Crowley v. Cohen*, 3 B. & Ad. 478 (ante, 843); where an insurance effected in the ordinary form of a marine policy, "on goods on board canal boats—beginning the adventure from the lading of the goods, and continuing it until the same are safely discharged," was held to cover the interest of the plaintiff in goods which had been delivered to them for transportation as common carriers, notwithstanding the objection, that the interest in question was too peculiar and limited to be protected

by general words of insurance, and ought to have been specifically designated in the policy. "I agree," said Tindal, C. J., in delivering his opinion, "with the counsel for the plaintiffs, that although the subject matter of the insurance must be properly described, the nature of the interest may in general be left at large;" while Parke, J., said, that, as the nature of the interest only bore on the question of damages, it was never specifically set forth in the policy. This decision was followed in *Van Natta v. The M. S. Ins. Co.*, 2 Sanford, 490, and it was held that the owner of a canal boat, might cover goods which had been delivered to him for transportation, by a policy in the ordinary form without specifying the peculiar nature of his interest, or indicating in any way that it grew out of his responsibility for the safe keeping of the property, and had nothing to do with title or ownership. In like manner, a tenant from year to year, may effect a valid insurance, in the language ordinarily used in insurances of the fee; *Niblo v. The North American Ins. Co.*, 1 Hall, 531; while a similar decision was made in *Fletcher v. The Commonwealth Ins. Co.*, 18 Pick. 419, with reference to an insurance effected by an occupant of land, under a license determinable at any time on six month's notice, by the owner of the soil. A similar view was taken in *The Franklin Fire Ins. Co. v. Drake*, 2 B. Monroe, 471; and *Curry v. The Commonwealth Ins. Co.*, 10 Pick. 535, where the question arose on an insurance by a tenant for life, of an undivided moiety of the premises insured; while in *The Protection Ins. Co. v. Harmer* 22 Ohio, 2 Ohio N. S., 452; the Supreme Court of Ohio cited the rule above stated, and applied it to an insurance by a partner of his interest in goods which formed part of the assets of the firm; *Angell on Fire and Life Insurance*, sect. 182. A similar decision may be found in *Irving, v. The Excelsior Ins. Co.*, 1 Bosworth, 507.

These decisions, are a necessary and legitimate consequence from the nature of the policy, as a wide and comprehensive contract of indemnity, binding the insurers to keep the insured safe and harmless from loss by the injury or destruction of the property, and entitling him to compensation for any damage which he may sustain, in derogation of this engagement. And it is true in general of every guaranty that if the risk is defined with sufficient accuracy, other matters may be left at large.

Property subject to or held as a security for a debt, falls within this principle, and may be insured by the creditor in general terms, without stating that his interest is limited to a lien for the debt and will cease if that is paid (ante, 824.) But the interest of a lender on a bottomry or respondentia, forms an exception to a rule, which would otherwise be general, and will not be covered by a general insurance on the ship or cargo, unless specifically set forth or described in the policy. *Glover v. Black*, 3 Burrow, 394; *Robertson v. The United Ins. Company*, 2 John-

son's Cases, 250. This may have arisen from the peculiar nature of this species of hypothecation, which makes the liability depend on the safety of the vessel, and may consequently lessen the efforts made for her preservation (ante, 822).

Although the duty of representation or disclosure, goes farther in the contract of insurance than in any other case, where men meet on an equal footing, and are free from the obligations imposed by special or fiduciary relations, it is, notwithstanding, confined to those facts or particulars which are material to the risk, and which could not well be known or inferred, unless they were stated. *Hodgson v. The Marine Ins. Co.*, 5 Cranch, 100; 1 Phillips on Insurance, 214; 1 Smith's Leading Cases, 775, 6 Am. ed. Whether the title to a vessel resides in the insured or in some other person, can have but little influence on the chance of her escaping from the perils of the voyage, and may, moreover, always be made the subject of an inquiry by the insurers. Hence, no wrong is done, and no injury can well be presumed to be occasioned by silence on a point, which one party may not have thought worthy of being communicated, and about which the other has not chosen to inquire. The better opinion would consequently seem to be, that an insurance may in general be effected without disclosing the title of the insured, or stating the special circumstances which give him an interest in the preservation of the subject matter of the insurance. The point, which would seem to have been thought too plain for question in England, was put at rest in this country so far as marine insurances are concerned by the principal case, which is sustained by the subsequent course of decision. *Bartlett v. Walton*, 13 Mass. 267; *Bixby v. The Franklin Ins. Co.*, 8 Pick. 86; *Buck v. The Chesapeake Ins. Co.*, 1 Peters, 151.

But while the rule is well settled, with reference to marine insurances, a different view is taken by the Supreme Court of the United States, where insurances against fire are in question; and it has been held, that although a special or limited interest may be covered by general words of insurance, it must, notwithstanding, be stated specifically to the insurers, who ought to be apprised of the extent and nature of the right or title of the insured, whenever it falls short of the absolute estate or ownership of the property at risk. The question arose in *The Columbia Ins. Co. v. Lawrence*, 2 Peters, 25, where the court were clearly of opinion, that the plaintiffs were chargeable with a misrepresentation or concealment in describing property as theirs in the application for insurance, in which they had but a limited and equitable interest growing out of a contract for the purchase of one moiety, and a lease for life of the residue. "In this case," said Marshall, C. J., "the original offer for insurance was in these words: What premium will you ask to insure the following property, belonging to Lawrence and

Poindexter, for one year, against loss or damage by fire, on their stone mill, four stories high, covered with wood, on an island about one mile from Fredericksburg, in the county of Stafford, the mill called Elba mill? Seven thousand dollars are wanted. Not within thirty yards of any other building, except a corn-house, which is about twenty yards off.

"The policy states, that the underwriters insure Lawrence and Poindexter against loss or damage by fire, to the amount of seven thousand dollars, on their stone mill, &c.

"The declaration charges, that the defendants were insured by the plaintiffs seven thousand dollars, against loss or damage by fire, on their stone mill, &c., and avers that they were interested in, and the equitable owners of, the premises insured as aforesaid, at the time the insurance was made as aforesaid, &c.

"The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured? The offer describes the property as belonging to Lawrence and Poindexter, and states it afterwards to be their stone mill. It contains no qualifying terms, which should lead the mind to suspect that their title was not complete and absolute. The plaintiffs in error contend, that the terms import an absolute legal estate in the property, and that the insurers entered into the contract, having a right to believe that the interest of the assured was of this character.

"Instead of such an estate as the representation justified the insurers in expecting, the proof shows that the insured held only one-half of one-third under a lease for three lives, renewable forever, and one-half of the other two-thirds, as mortgagees; that the other moiety was held under a contract, the terms of which had not been complied with, and which, if complied with, would give them a title of two-thirds of that moiety only as mortgagees.

"The defendants insist, that the representation is satisfied by an equitable title under an executory contract; and that, in truth and in fact, the mill did, at the time of its insurance and loss, belong to Lawrence and Poindexter.

"It may be true, that the mill occupied by Lawrence and Poindexter, and held under a lease or an executory contract, would be generally spoken of by themselves and others, as their mill. The property alluded to, would be well understood, and no inconvenience could arise from this mode of designating it. But if Lawrence and Poindexter should proceed to sell the property as theirs, and should describe it in the contract as belonging to them, no court would compel the purchaser to take the title they could make.

"The assured, then, have not proved such an interest as has been described in the original offer for insurance, and the Circuit Court, in

this respect, misdirected the jury. It may be proper to take some notice of the materiality of this misdirection.

"The contract for insurance is one in which the underwriters generally act under the representation of the assured; and that representation ought, consequently, to be fair, and omit nothing which it is material for the underwriters to know. It may not be necessary that the person requiring insurance, should state every incumbrance on his property, which it might be required of him to state, if it was offered for sale, but fair dealing requires, that he should state everything which might influence, and probably would influence the mind of the underwriter, in forming or declining the contract. A building, held under a lease for years, about to expire, might be generally spoken of as the building of the tenant, but no underwriter would be willing to insure it as if it was his, and an offer for insurance, stating it to belong to him, would be a gross imposition.

"Generally speaking, insurances against fire, are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriters in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles, as on the interest of the insured, and it would seem to be, therefore, always material, that they should know how far this interest is engaged in guarding the property from loss. Marshall, in treating on Insurance on Fire, b. 4, ch. 2, p. 789, says: 'It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor, or agent, with the custody of goods to be sold on commission, may insure, but with this caution, that the nature of the property be distinctly specified.'

"In all the treatises on insurance, and in all the cases in which the question has arisen, the principle is, that a misrepresentation, which is material to the risk, avoids the policy. In this case, the Circuit Court has decided, that there is no misrepresentation; that the interest of the insured was truly described in the offer for insurance, and consequently no question on the materiality of the supposed variance, was submitted to the jury.

"As this court is of opinion, that a precarious title, depending for its continuance on events which might, or might not happen, is not such a title as is described in the offer for insurance, construing the words for that offer, as they are fairly to be understood, the Circuit Court has, in this respect, misdirected the jury."

These views were cited and approved by the same tribunal, when the

case came before them on a subsequent occasion (10 Peters, 307), and have been adopted by several of the State tribunals. Thus in *Catron v. The Tennessee Ins. Co.*, 6 Humphreys, 176, the policy was held to be void, on the double ground, that the insured had described the property unqualifiedly as his, while his real interest was that of a tenant in common, and had represented it to be worth \$12,000, although its real value was only \$8,000. Whether the insured would gain or lose by the destruction of the property, was said to be material to the risk by operating as an inducement to fraud or furnishing a motive for vigilance, and the insurers were consequently held entitled to a full disclosure of everything which related to the quantity, or value of the interest at risk. A concealment of the interest of the insured, was also held material, in *The Illinois M. Fire Ins. Co. v. The Marseilles M. Fire Ins. Co.*, 1 Gilman, 236, but the charter of the company contained a special provision, which was amply sufficient to sustain the decision, without a resort to general principles, which were not invoked by the court; while Story, J., seems to have been of opinion, in *Carpenter v. The Washington Ins. Co.* (ante, 874), that an insurance by a mortgagee will be invalid, unless the limited nature of his interest is communicated to the insured.

Several cases may be found, which tend to sustain this view of the question, by deciding, that the ratio between the value of the property and the sum insured, is so far material to the risk, that a misrepresentation as to value, will discharge the insurers, even when it results from mistake or error. *Howell v. The Cincinnati Ins. Co.*, 7 Ohio, 276. Thus, in *Carpenter v. The American Ins. Co.*, 1 Story, 36, the plaintiffs, who had succeeded in procuring an additional insurance, after it had been once refused, by a false or exaggerated representation, that \$12,000 had been expended on the property since it was first insured, were held to be precluded whether the inaccuracy of their statement was due to mistake or to actual fraud, because it had obviously been the means of deceiving the insurers, and inducing them to accept a risk which they might otherwise have rejected. And the general principle, that whatever increases the danger of a fraudulent or felonious destruction of the property, is material to the risk, and will avoid the policy if concealed or misstated in the application for insurance, is sustained by the case of *The New York Ins. Co. v. The New York Bowery Ins. Co.*, 17 Wend. 359, where the failure to mention an unfavorable report, with regard to the character of the owner of the property, in effecting a re-insurance, was treated as a concealment of a material fact, and held to be a good defence to an action against the re-insurers.

It is, however, conceded, even under this view of the question, that the materiality of such a disclosure or concealment is a question of fact,

which must be decided by the jury; *The Franklin Ins. Co. v. Coates*, 14 Maryland, 285; 1 Smith's Leading Cases, 787; 6 Am. ed.; although they may, and should be told, that, where a disclosure is material, the failure to make it will avoid the policy, in point of law. The point arose in *The Columbia Ins. Co. v. Lawrence*, 10 Peters, 307, where Story, J., who delivered the opinion of the court, held that the jury were entitled to determine, whether the peculiar and limited nature of the title of the insured increased the risk, and would consequently have augmented the premium, if communicated to the insurers, but should, at the same time, have been instructed, that if they found this point affirmatively, the contract was void, and the verdict should be for the defendants.

The courts of this country have, notwithstanding, in general refused their assent to the case of *Lawrence v. The Columbia Ins. Co.*, and hold that the nature of the interest of the insured in the property is immaterial to the risk, and need not be communicated to the insurers, unless required by the conditions of the policy, or when a failure to state it would operate as an actual fraud. Thus, in *Strong v. The Manufacturers' Ins. Co.*, 10 Pick. 40, a statement by the insured, in answer to a question put by the insurers, that the building insured was his own, was held not to invalidate the policy, although it was not only subject to a heavy mortgage, but had been levied upon by the sheriff under an execution, on which it was soon afterwards sold; while a similar view was taken in *Curry v. The Commonwealth Ins. Co.*, 10 Pick. 535, with reference to a statement in an application for insurance, by the husband of a tenant in common of the house insured, in which the premises were described as belonging to him; there being evidence that he acted in good faith, and under an agreement by which he was to have the exclusive possession of the property. This view of the law was carried still farther, in *Fletcher v. The Commonwealth Ins. Co.*, 18 Pick. 417, and pushed to its ultimate consequences by a decision, that a house erected on the land of another, by his permission, and removable at any time on six months' notice, might be protected by general words of insurance, without informing the underwriters of the precarious nature of the tenure. No case could well be better fitted for the application of the rule laid down in *The Columbia Ins. Co. v. Lawrence*, for in none could the temptation be stronger to procure the destruction of the building, as a means of converting it into money, and avoiding the expense and trouble of removing it from the land; but the court were clearly of opinion, that the influence which these circumstances might have upon the risk, was too remote to make the silence of the insured a bar to an action upon the insurance. "If," said Putnam, J., in delivering the opinion of the court, "the concealment was material, it will avoid the policy, notwithstanding the



assured did not intend to commit any fraud. And it is true, that the materiality of the fact concealed, is a question for the jury. These general principles are well established. But the assured may well be silent, as to various matters connected with, or having some relation to the property insured, without any prejudice to his insurance, provided that such silence was not intended to deceive or defraud the underwriter. *Aliud est celare, aliud tacere.* In the case at bar, the defendants say, that the plaintiff withheld information which was material to the risk, and which, therefore, ought to have been communicated. And the fact so withheld, is stated to be, that the plaintiff did not inform the defendants, who owned the land on which the building stood. Now, it seems to us very clear, that it was not necessary that he should. He stated his property in the building, goods, &c., &c. He stated in what town and street it stood. He stated everything, truly. And it seems to us, that if the defendants wanted any further information, they should have requested it. Now, it is contended, the land belonged to another; that there was a right reserved for the owner, to cause him to remove his store in a certain time, and as his tenure was such, he would be less careful of the property, and so the risk would be greater than it would be, if the plaintiff owned the land as well as the building. We think this is more ingenious than substantial. If, in truth, the plaintiff owned the land on which his building stood, it might be, that he wished to have a new framed store, instead of the old one, and it would be within the region of possibility, that he would not be so likely to take as good care of the old one, as he would if it were a new one, and he might honestly omit to state his desire to substitute a new store for his old. But such a suggestion of such an omission, although quite as likely to affect the risk, could not be a foundation sufficient to support a verdict, avoiding the policy for concealment. It would, we think, be sufficient for the plaintiff to describe the property to be insured, as it then existed, and if the defendants wished for more particular information touching the risk to be assumed, and the motives, more or less strong, which would operate with the plaintiff in regard to the care he would take of the property, they should inquire."

The courts of New York adopt the same view of the question, and hold that the title of the insured is not material to the risk, unless made so by the terms or conditions of the contract between him and the insurers. Thus, in *Niblo v. The North American Ins. Co.*, 1 Sanford, 531, judgment was given in favor of a tenant from year to year, on a policy of insurance in the usual form, notwithstanding the objection that he had misled the insurers, by describing the property as his own, in the application for insurance. Similar ground was taken in *Tyler v. The Ætna Ins. Co.*, 12 Wend. 507, where the court refused

their assent to the rule which had been laid down in *The Columbia Ins. Co. v. Lawrence*, and held, that the equitable estate arising under a contract of sale, which had not been perfected by a conveyance of the legal title, might be insured by the purchaser, without apprising the insurers that part of the purchase money still remained unpaid. The application for the insurance, was "on my house, in which I reside;" which gave birth to the argument, that the plaintiff had not only concealed the true state of his title, but misrepresented it in a material particular, and thus forfeited the right to the protection of the policy. But the court were of opinion, that even if the statement was not literally or accurately true, it was clearly immaterial to the risk, and therefore no defence to the action, unless shown to have been fraudulent in its purpose. "It is," said Nelson, J., in the course of his opinion, "a well established principle of the law of insurance, that a *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after inquiry, of the true state of the property; and that the applicant need not represent the particular interest he has at the time, unless inquired of by the company. *Locke v. North American Ins. Co.*, 13 Mass. R. 61; *Bartlet et al. v. Walter*, Ib. 267; *Oliver v. Green*, 3 Id. 133; 4 Id. 330; 8 Pick. Id.; Phillips on Ins. 64, 94. Our own course of decisions has obviously been upon this understanding of law, in accordance with the above principle, and such I apprehend, is the doctrine of the courts in England: 1 Caines, 276; 2 Id. 203, 19; 1 Johns. R. 385; 11 Id. 302; 1 Hall's R. 126, 130; 9 Wendell, 409; Marsh. on Ins. 589; *Rising v. Bennet*, Ib. 590; 3 Burr. 1391; 1 Bl. R. 423; Phillips on Ins. 64, 94, 41. The nature and extent of the interest of the insured, may, in some instances, be material facts in making an estimate of the risk and rate of the premium, and upon general principles, applicable to this action, a disclosure would seem to be required, but generally, they cannot be so material as to justify a conclusion that they would have varied the premium paid. The necessity of disclosing the title of the applicant, would greatly embarrass the operation of insurance, without affording any benefit to the offices. Any error in the declaration, or description of the title, might be fatal. The rights of the insurer are sufficiently guarded, by his having power to exact, by inquiry, a description of the interest of the applicant, and by the recovery being limited, in case of loss, to the value of the interest proved on the trial. The minuteness of the proposals and conditions as to the description required of the property to be insured, without specifying the nature or extent of the interest, affords a reasonable inference, that this information is not deemed material or indispensable. The insurer is only responsible to the extent of the interest of the applicant,

and that must be shown upon the trial. The only object, therefore, in the previous disclosure of it, is to enable the insurers to estimate the risk and premium. I have said that this cannot generally be material in a degree that would deserve consideration."

This decision was affirmed by the Court of Errors; where the remarks of the chancellor concurred with, and sustained the language held in the court below. *The Ætna Ins. Co. v. Tyler*, 16 Wend. 385. The same view was taken in *Morrison v. The Tennessee M. F. Ins. Co.*, 18 Missouri, 362; *The Insurance Co. v. Woodruff*, 2 Dutcher, 541, 551; *The Hope M. Ins. Co. v. Brolaskey*, 11 Casey, 282, and *Harmer v. The Protection Ins. Co.*, 22 Ohio, 452; while the recent case of *Dilahay v. The Ins. Co.*, 8 Humphreys, 684, would seem to show, that the courts of Tennessee are disposed to abandon the ground taken in *Catron v. The Tennessee Ins. Co.*, and adopt the rule which prevails in New York and Massachusetts.

Of these opposite views of the law, that may justly be preferred, which confines the duty of representation to matters which are obviously material to the risk, and declines to make the plaintiff answerable for silence on others, which he may have refrained from mentioning in good faith, and under the influence of a sincere belief that they would be thought as unimportant by the insurers, as they seemed to himself. These are no doubt points of which the insurers cannot reasonably be required to take notice, without some communication by the insured, of a nature to rouse their attention, and put them on their guard. But this cannot be said of the interest of the person who effects the insurance, which must necessarily exist in some form, and may consequently be made a subject of inquiry, without a preliminary disclosure. Hence, if the insured are chargeable with negligence, in remaining silent, the insurers are at least equally culpable, in not asking for information, and the case would seem to fall within the general principle, under which no one can hold another responsible for the consequences of a default or oversight, in which both have participated. This conclusion is strengthened by the silence of the English reports on a point, which could hardly fail to have been taken, had it been thought tenable, either by the bench or the bar.

Under ordinary circumstances, an incumbrance is equally immaterial with a defect of title, and need not be communicated by one party, unless in answer to a question put by the other. When, however, a creditor insures property which has been pledged, or mortgaged as a security for the debt, a prior encumbrance may have an important bearing on the contract, by diminishing the security of the lien which constitutes the interest at risk, and rendering it less effectual as a means of indemnity, should the insurers be subrogated to the rights of the creditor, upon paying the loss. The law was so held in *Smith v. The Ins.*

*Co.*, 5 Harris, 253, and judgment given for the defendants, on the ground, that the failure of the plaintiff to disclose the existence of a prior mortgage, vitiated the insurance of a house in which he was interested as mortgagee. In this case, however, the insurance was expressly asked, and obtained, for the purpose of covering the mortgage, and it will not apply when the creditor insures the thing, although his interest may be limited to a lien upon it, as a security (*ante*, 825).

Whatever the rule may be in other cases, it is well settled, that when the contract is mutual, making each of the parties individually liable in the event of the insufficiency of the common fund, title and value will be so far material, as to render a misrepresentation with respect to either fatal to the right to enforce the policy, especially if it occurs in an answer to a question which directs the attention of the insured to the subject, and apprises him of the importance attached to it by the insurers. *Brown v. Williams*, 28 Maine, 252; *Davenport v. The New England Ins. Co.*, 6 Cushing, 340; *Smith v. The Bowditch M. F. Ins. Co.*, *Ib.* 448; *Lowell v. The Middlesex Ins. Co.*, 8 *Id.* 127; *Marshall v. The Columbia Ins. Co.*, 7 Foster, 167; *The Eminence Ins. Co. v. Lessee, 1 Metcalf*, Kentucky, 523; *Loehner v. The Home M. Ins. Co.*, 17 Missouri, 247. The same result will follow from a failure to state the encumbrances on the property truly, according to the requisitions of the policy, or in reply to a question put by the insurers. *The Bowditch M. Ins. Co. v. Winslow*, 3 Gray, 415; *The Penna. Ins. Co. v. Gottsman*, 12 Wright, 151. And the insurers may always compel a full disclosure of title, by making it the subject of a warranty or express condition *Phillips v. The Knox County M. Ins. Co.*, 20 Ohio, 174.

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## DOUBLE INSURANCE. VALUATION.

## KANE AND KANE AGAINST THE COMMERCIAL INSURANCE COMPANY OF NEW YORK.

In the Supreme Court of New York.

AUGUST TERM, 1811.

[RECORDED, 8 JOHNSON'S REPORTS, 220-236.]

*Insurance was made to the amount of 15,000 dollars, on "goat skins valued at 50 cents each;" and the policy contained the usual clause as to prior insurance. A prior insurance had been made, by an open policy, on the cargo, on board of the same ship, for the same plaintiffs, to the amount of 22,000 dollars. The prime cost of the skins was 10 cents each. Estimating the skins at 50 cents each, and the rest of the cargo at the invoice prices, and deducting the prime cost of the skins, the amount was sufficient for both policies; but the cargo, exclusive of the skins, was not sufficient to absorb the prior insurance. In an action on the second policy, it was held, that the whole of the goat skins were to be valued at 50 cents; and after deducting from this amount, the difference between the invoice price of the cargo and charges exclusive of the goat skins, and the 22,000 dollars, or amount of prior insurance, the residue would be the interest covered by the second policy; that it was immaterial whether the first policy was open or valued, if the skins, at 50 cents each, would furnish interest for both policies. The valuation in a policy is conclusive on the insurers, if there is no fraud or imposition.*

THIS was an action on a policy of insurance "upon goat skins, laden, or to be laden, on board the brig Brutus, at Coringa, in India, on a voyage from thence to New York, valuing the said skins at 50 cents each." The policy was dated the 15th November, 1808, and the sum of 15,000 dollars was subscribed. It contained the usual printed clause respecting prior insurance.

The cause was tried at the New York sittings, before Mr. Justice Spencer, in April, 1810.

The plaintiffs offered to prove, that on or about the 15th of November, 1808, they made application to the defendants for insurance, to the amount of 25,000 dollars, on profits, on the cargo

of the ship *Brutus*, from Coringa to New York, and informed them, at the time, of a prior insurance effected by the Phoenix Ins. Co., and that nearly the whole of the interest of the plaintiffs on board the said brig, was covered by that insurance; but that (as the truth was) they had received a letter from their supercargo, informing them of the purchase and shipment of the goat skins, the cost of which, in India, was less than 10 cents per skin, when the value in the United States, would be about 75 cents, or to that effect. The defendants declined to make an insurance upon profits, *eo nomine*, as being against the rules of the company, but suggested that the purpose of the plaintiff might be as well effected, by valuing the premises to be insured; whereupon it was agreed between them, that the goat skins on board the said brig, should be valued at 50 cents a piece, and that the sum of 15,000 dollars should be insured upon the same, at that valuation, by the defendants, at a premium of twelve and a half per cent., and the insurance was made on the said skins at the said valuation, accordingly. That the plaintiffs were very desirous to have the skins valued at 75 cents, and the amount of insurance increased, but the defendants refused to value them higher than fifty cents: that the letter, mentioned by them, had then just been received by the plaintiffs, from their supercargo in India, and was the cause of the application to the defendants for the insurance. This evidence was objected to, but overruled, by consent, it being agreed between the parties, that in case it should be deemed admissible, and thought material by the court, a new trial should be granted, unless the court should be of opinion that the plaintiffs were entitled to recover on the case, according to their claim, without such evidence.

The *Brutus* sailed from Coringa for New York, on the voyage insured, with a return cargo on board, the invoice cost of which, including the goat skins, was 19,420 dollars, and 79 cents, making, together with the charges and premiums of insurance, an insurable interest, on the open policy, to the amount of 22,000 dollars and upwards. Part of the cargo consisted of 58,629 goat skins, which, at Coringa, cost 5,331 dollars.

The vessel and cargo were captured by a French cruiser, and carried into Cayenne, and there condemned. Prior to the making of the policy of insurance in question, the plaintiffs had caused another policy to be made by the Phoenix Ins. Co. from New York to Coringa and back, to the amount of 22,000 dollars, being an

open policy of insurance, at a premium of 9 per cent., which was, afterwards, and prior to the policy in question, increased to 14 per cent. on account of a supposed deviation.

The value of the goat skins, at 50 cents each, was 29,314 dollars and 50 cents, and deducting the prime cost of them in India, left an interest on the second, or valued policy, according to the valuation, of 23,983 dollars and 48 cents. A verdict was taken as for a total loss, for the amount subscribed by the defendants, subject to the opinion of the court, on a case, as to what amount the plaintiffs were entitled to recover; and the verdict was to be modified accordingly, unless the court should think, from the facts in the case, a new trial ought to be awarded.

*S. Jones, jun.*, for the plaintiffs. Taking the goat skins at the valuation in this policy, and the rest of the cargo at the invoice price, and deducting the prime cost of the skins, the whole interest is above 48,000 dollars, a sum more than sufficient for both policies. The only question is, whether this is not the correct mode of estimating the insurable interest. From the established rule on this subject, the defendants must be considered as admitting the value, as agreed to in the policy. In respect to this policy, we are to look to the agreed valuation; and unless the whole of such valuation is covered by the prior insurance, the defendants must be answerable for what is not covered by that policy. As it regards the present parties, the first policy is *res inter alios acta*; and the two policies can be viewed in connection only for the purpose of carrying into effect the agreement as to prior insurance; and that agreement may be completely satisfied, without prejudice to the plaintiffs' claim for the full amount of the present policy.

The case of *Murray and Mumford v. Insurance Company of Pennsylvania*, decided in the Circuit Court of the United States for the district of Pennsylvania, confirms the construction for which we contend, namely: "that the second policy will cover so much of the agreed value, as was not covered by the prior insurance."

An insurance on profits is considered as a valued policy on goods. Now the goods may be abandoned to the insurers on goods, for a total loss; and the insurers on profits will be liable for the agreed value in the policy on profits. The plaintiffs offered to show that the defendants were apprised, that this was intended to be an insurance on profits; and that not being willing to insure them, they agreed that the subject should be so valued as to cover

the profits. The parol evidence, so offered, did not contradict the contract; it served only to explain it.

*Wells, contra.* If the second policy had been open, it is perfectly clear, that the plaintiffs could recover no more than what remained uncovered, by the first policy, at the prime cost, or invoice price and charges. Policies of insurance are for the benefit of trade; and their real object is the indemnity of the insured. All beyond a complete indemnity for actual loss, is mere speculation. Parties who seek to recover beyond an indemnity, or for speculative profits, are not to be favored. If the plaintiffs obtain, on both policies, all that the property has cost, and all expenses and charges, will they not be fully indemnified? Will they not be fully covered?

In *Murry and Mumford v. Ins. Co. of Pennsylvania*, as reported in *Hall's Law Journal*, i. 161, both policies were valued, and the actual value was proved to be 6,000 dollars.

If the plaintiffs, in this case, are covered by the first policy, except for 1,000 dollars, they are to recover so much, according to the valuation in the second policy, and no more. If an abandonment had been made to the insurers on the first policy, what would remain, but this difference, to be abandoned to the insurers on the second policy? The plain language of this policy is, for as many of the skins as are not covered by the first policy, we agree to insure for you, at the valuation of 50 cents each.

If the doctrine contended for, on the part of the plaintiff, is established, then the plaintiffs might recover on this policy at a valuation of 50 cents; on a third policy, with a different insurance company, at a valuation of 75 cents; and on a fourth policy, with another insurance company, at 100 cents; and so on, to an unlimited extent. This would, in effect, render such insurances mere wager policies, or policies without interest.

If the plaintiffs intended this as a policy on profits, it ought to have been so expressed. The court will not convert a policy on goods into a policy on profits. Parol evidence was inadmissible. Where there is a written contract, all parol conversations previous to its execution are disregarded, and the parties are confined to their written agreement.

The case of *McKim v. Phoenix Insurance Company* in the Circuit Court of the United States, for the district of Pennsylvania, is analogous to the present. It is there said that the first policy covered so much of the coffee, as, at first cost and charges, would



amount to 12,000 dollars (the sum subscribed), and the defendants on the second policy, which was on 125,000 pounds of coffee, valued at 22 cents per lb., were liable for the residue, to be valued at 22 cents per pound.

*Harrison*, in reply. The parties to this policy have agreed, that the skins insured are worth 50 cents each. It has always been held in England that profits may be covered, by including them in the valuation of the goods. In this country there is no law against wager policies. Suppose, after goods are shipped and insured, the owner discovers that they will be worth, at the port of delivery, a much larger sum, may he not, by another policy, cover this increased value? If there had been no prior insurance, it cannot be doubted that the plaintiff would recover on the second policy, for the whole of the skins, according to the valuation. How do the plaintiffs gain a double satisfaction in this case? The indemnity, which the insured has a right to claim is the value agreed upon; otherwise, there is no difference in effect, between an open and a valued policy. Profits may always be covered, if the insurer is apprised of the nature of the subject. It is done, either by insuring the profits, *eo nomine*, or by including them in the valuation of the goods.\* Why, then, should not the court give effect to the second policy? The prior policy is not to be resorted to for the criterion of value.

THOMPSON, J., delivered the opinion of the court. The policy in this case contains the usual clause respecting prior insurance, and it appearing in evidence that 22,000 dollars had been previously insured, this must first be deducted, and the underwriters made responsible for the residue only. The prior insurance was by an open policy upon the cargo generally. The present is a valued policy upon goat skins specifically, at 50 cents each. In order, therefore, to give effect to both policies, the first ought to be considered as attaching, in the first instance, upon that part of the cargo not covered by the latter, in order to leave aliment for the latter. The cargo exclusive of the goat skins, was not sufficient to absorb the prior insurance, and the only difficulty, in this case, is, to ascertain what portion of interest in the goat skins had been covered by the prior policy. In estimating the loss under that policy, the goat skins must have been reckoned at 10 cents each, that being the prime cost. This is a well settled rule, and it is equally well settled, that the valuation in a policy is conclu-

sive upon the underwriters, when there is no suggestion of fraud or imposition. (2 East. 109; *Shaw v. Felton*.) The defendants are, therefore, estopped from saying they are not answerable for the goat skins at 50 cents, deducting the amount covered by the former policy. It is immaterial, as it respects the present defendants, whether the prior policy was open or valued; provided the goat skins at 50 cents each, will furnish interest sufficient for both policies. Suppose both policies had been on goat skins only, the first valued at 10 cents, and the second at 50 cents, would not the underwriters on the second policy, be answerable for the loss at 40 cents a skin, which would be the interest uninsured by the first policy? And what difference in principle can it make, whether the 10 cents are deducted in consequence of a valuation by the parties, or in consequence of that being the valuation fixed by law, the policy being open? The underwriters on this policy have no right to say, that because the assured had received 10 cents on each, that the skins had been fully paid for. They were not paid for, according to the valuation in this policy, which is conclusive upon the defendants. The policy is not that, as many of the goat skins as remain uncovered by the former policy, at the invoice price, shall be covered by this policy, at the valuation. This is not the sense and meaning of the contract. It is, that the goat skins laden on board, shall be valued at 50 cents; and, in determining how far the plaintiffs' interest has been exhausted by the prior policy, all the goat skins on board are to be reckoned according to this valuation. No other construction will give effect to the contract. The prior policy was 22,000 dollars, and in order to determine how much of the plaintiffs' interest was covered by it, the invoice price of the cargo, exclusive of the goat skins, must first be ascertained, and whatever that sum, together with the usual charges, falls short of the 22,000 dollars, will be the sum to be deducted from the amount of the goat skins, at 50 cents each, in order to exhaust the prior policy; and the residue forms the interest upon which the second policy is to attach. And this, according to the data furnished by the case, will be more than the amount of the defendants' subscription in the present policy.

The case most analogous to this, is that of *McKim v. The Phoenix Insurance Company*, in the Circuit Court of the United States for Pennsylvania, and which is mentioned by Judge Washington, in the case of *Murray and Mumford v. Insurance Company of Pennsylvania* (1 Hall's Law Journal, 161). There was a prior

open policy, to 12,000 dollars, and a subsequent policy to 15,000 dollars, on coffee (part of the same cargo), at 22 cents per pound: And it was "decided that the first policy covered as much of the coffee as 12,000 dollars would absorb at prime costs and charges, instead of the value fixed on that article in the second policy, which, of course, would leave to be covered by the second policy, as much less of the cargo, as the difference between the prime cost and charges, and 25 cents, would amount to, and for so much of the cargo, the Phoenix Company was held to be answerable." According to this report of the case, the underwriters on the second policy were held liable for the difference between the prime cost of the coffee, and the valuation in the policy subscribed by them. The report of the same case, in a note in Condry's edition of Marshall (152, b), might warrant a different construction; but is not so precise, and probably not so correct, for the case in Hall appears to be the report of the judge himself.

We are, accordingly, of opinion, that the the plaintiffs are entitled to recover as for a total loss, to the amount of the verdict.

Judgment for the plaintiffs.

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A double insurance is governed by the principles which apply in other cases, where two or more several and collateral promises are made to do the same thing, or with reference to the same subject matter; and while judgment may be recovered against each of the contractors contemporaneously, or at different periods, as if the engagement of the others had no existence, payment of the full amount of the loss by one, may be pleaded as a defence or satisfaction by all, and will entitle the person who makes it to claim contribution from the rest for their share of the burden. See *The American Ins. Co. v. Griswold*, 14 Wend. 399; *Whiting v. The M. Ins. Co.*, 15 Maryland, 297; *Newby v. Reid*, 1 Wm. Blackstone, 416; *Lucas v. The Jefferson Ins. Co.*, 6 Cowen, 635; *Wiggin v. The Suffolk Ins. Co.* 18 Pick. 145; *Thornton v. Koch*, 4 Dallas, 348; *Peters v. The Delaware Ins. Co.*, 5 S. & R. 471.

But, although the rule which forbids a double satisfaction for one injury, and makes the recovery of a full compensation from one a bar to a subsequent suit for the same tort or loss against another, applies with full force to the contract of insurance; *Irving v. Richardson*, 2 B. & Ad. 193 (ante, 826); yet it is not the less true, that the question whether the plaintiff has been paid or satisfied, must be determined in every instance by the terms of the contract which he seeks to enforce, without reference to the standard of compensation, or value, which

would or might have been applicable, in a controversy between him and other persons. Hence, a suit brought on a valued policy, cannot be resisted by proof that the plaintiff received the full value of the property, as assessed by a jury in a prior action on another insurance, where the question was decided agreeably to the fact, and without the trammels of a valuation; nor will a recovery of the full value of the vessel, as fixed by the terms of one policy, operate as a bar to a suit upon another, whether valued or open, for the amount by which the valuation in the first falls short of the real value. Thus, in *Bousfield v. Barnes*, 4 Campbell, 288, a suit brought to recover £600, underwritten on a policy, in which the vessel was valued at £6000, was resisted on the ground, that the plaintiff had previously received the full amount of the valuation on another insurance, and was consequently precluded from claiming anything more. But Lord Ellenborough was clearly of opinion, that the defence thus made was insufficient, because the valuation was only binding as between those who were parties to it, and could not be set up by a stranger as a reason for refusing the plaintiff an indemnity for the real value of the vessel, which was proved to have been worth £8000. The law was held the same way in *Higginson v. Dall*, 13 Mass. 96, and *Kenny v. Vanhorne*, 1 Johnson, 485, which decide, that to make a recovery on one policy operate as a bar to an action on another, the amount received under the first, must be such as to constitute a full satisfaction or indemnity for the loss as measured by the terms of the second. Hence, where one insurance is open, and another valued, payment in full under the latter will be no answer to a suit on the former, unless it equals the real value of the vessel; and for the same reason, payment of a full compensation for the real loss on an open policy, will not bar a recovery on another in which the interest at risk is valued, for the excess of the valuation over the real value (ante, 858).

A different view was taken in *Craig v. Murgatroyd*, 4 Yeates, 161, and an abandonment to the underwriters on an open policy, followed by a payment of the real value of the goods abandoned, held to be a good defence to a suit upon a valued policy, on the ground that, as the contract was one of indemnity, the receipt of a full compensation, precluded the right to demand anything more. This case is, however, obviously founded upon an erroneous idea of the office and effect of a valuation, and would seem too directly at variance with the general course of decision, to be viewed as law.

But although the cases which have been cited show, that the insured may always appeal to the valuation in the policy, as an answer to a defence founded on an allegation, that satisfaction has been received from another quarter; the better opinion would seem to be, that the insurers stand on a somewhat different footing, and cannot rely on a

prior recovery which falls short of the real value of the property, as a defence on the ground that it equals or exceeds the valuation agreed upon between themselves and the insured. . The point arose in *Kenny v. Vanhorne*, 1 Johnson, 385, where the vessel insured was valued at only \$2000, and \$3000 had been received on a prior insurance, which gave rise to the argument that, as the insurers could not go behind the valuation, it should be equally binding upon the insured, and that the loss should consequently be held to have been paid or satisfied in full. But the court were of opinion, that the valuation did not preclude the plaintiff from showing, that his interest exceeded the amount of the prior insurance, and consequently remained open for the operation of that on which he sued; and gave judgment against the insurers. The same question arose in *Watson v. The Ins. Co. of North America*, 3 Washington, C. C. R. 1, where the court said, that the amount of a prior insurance should be deducted from the real value of the property, and not from that at which it was estimated in a subsequent insurance. This view thus taken, is sustained by the case of *Bousfield v. Barnes*, which decides that, to make a recovery on one policy operate as a bar to an action on another, it must not only equal the valuation in the latter, but extend sufficiently far to cover the real value of the property, and operate as a full indemnity for the damage resulting from its loss. "I will take care," said Lord Ellenborough, "that the assured do not recover, upon the whole, more than the real value of the subject matter of the insurance. But, I think it is not competent for the underwriters upon a particular policy, to show that the assured has received from another quarter the amount of the valuation, unless this amounts in fact, to complete indemnity."

It results from what has been said, that while the insured is entitled to prove the real value of the vessel, for the purpose of showing that a prior payment of a sum, which equals or exceeds the valuation in the policy, is not a full indemnity for the loss, the converse of this proposition does not hold good, and the insurers are not at liberty to show, that the estimate agreed on in a valued policy exceeds the value of the property, and that a full satisfaction has been recovered under a prior open policy. This result may, at first sight, appear anomalous, but is a mere application of the general principle, under which the insurers are answerable for the whole estimated value of the property at risk, whenever the injury sustained equals the real value (ante, 858), and gives those who effect an insurance at a fixed rate or value, the option of resorting either to the valuation thus made, or to the real value, in answer to a plea or allegation that the loss has been fully compensated, by a payment received from another quarter. It is, in fact, plain that, as the insured may enforce an open policy, for the excess of the real value above the valuation in a valued policy which has been paid in full, where no

clause to the contrary intervenes, it would be altogether inconsistent to permit a recovery on an open policy, to prejudice the right to enforce a valued policy.

It is notwithstanding said, in *Arpould on Insurance*, on the authority of *Irring v. Richardson*, 2 B. & A. 193 (ante, 826), that when a ship is valued at the same rate in two different policies, a recovery of the full amount of the valuation on one, will be a conclusive answer to a suit on the other, even when the amount received falls short of the real value, and is an inadequate compensation for the injury. But this conclusion would seem at variance with reason, and is not sustained by the case cited for its support, which was expressly decided on the ground, that the interest insured was a mortgage, and that the amount received by the mortgagee more than covered the debt. The true explanation of the cases would seem to lie, in viewing the valuation as a branch or off-shoot of the general rule, under which the parties to a contract are allowed to liquidate or compute the damages, and thus diminish the risk and uncertainty of litigation. Although nominally a valuation of the thing, it is really an assessment of the amount to which the insured will be entitled in case it is destroyed, and simply serves to regulate and ascertain the amount due on the contract in which it occurs, without entitling the insurers to plead anything as an indemnity or satisfaction of the loss sustained by the insured, which is not so in point of fact (ante, 858).

In *Morgan v. Price*, 4 Exchequer, 615, it was, however, held that, when a ship is valued at the same sum in two different policies, the receipt of the amount due on one will be a satisfaction of the other. And in *Bruce v. Jones*, 1 Hurlstone & Colman, 769, the court said, in accordance with the rule laid down by Mr. Arnould (1 Arnould on Ins. 346), that the valuation is conclusive on both parties, and cannot be opened for the purpose of showing that the amount received on another policy falls short of the real value. The suit was on an insurance for £2400 on a ship valued at £3200, and a plea that the insured had recovered £3200 on divers prior policies, in one of which the ship was valued at £5000, was held to be good, whether her real value exceeded or fell short of the valuation of the policy in the suit. It was said, *arguendo*, and the court would seem to have conceded, that the amount to which the assured is entitled, may depend, under this rule, upon the order in which the policies are put in suit, and that if the plaintiff had obtained judgment in the first instance against the defendants, he might afterwards have taken advantage of the higher value set upon the vessel in the prior contracts.

The question has been complicated, by the introduction of a clause into most policies in this country, which provides that, if "the assured has made any other insurance upon the subject, prior in date, the in-

surers shall be answerable only for so much as the amount of such prior insurance, may be deficient towards covering the property at risk." This proviso varies the rule of the common law, under which, a double insurance gave the insured a right to choose on which of the insurers he would throw the burden of the loss (ante, 947), and restricts the operation of the second insurance to so much of the property or interest at risk, as is not covered or protected by the first. The problem may easily be solved, when both policies are open, or both valued at the same rate, but becomes more complex, when goods, which have been covered by an open policy are subsequently insured at a valuation, or when the first policy is valued, and the second open. The solution may, however, be found in remembering that, while the first insurance will operate, as if the second did not exist, the amount of interest left open for, and covered by the second, will depend primarily on its terms, and only secondarily on those of the first. The law was so held in the principal case, where the court said, that if skins, worth ten cents each, and insured for their full value, were subsequently valued and insured each at fifty cents, the excess of the valuation over the real value might be recovered under the second insurance, because it would otherwise be without any protection. This decision was followed in the subsequent case of *Minturn v. The Columbian Ins. Co.*, 10 Johnson, 75, where it was held, that only so much of the property covered by a second insurance was withdrawn from its operation by a prior policy, as would be fully protected by the latter, if estimated at the rate adopted in the former. The same principle had been stated by Washington, J., in *McKim v. The Phoenix Ins. Co.*, 2 W. C. C. R. 89, although the circumstances were not such to admit of its application; while the case of *Murray v. The Ins. Co. of Pennsylvania*, 2 W. C. C. R. 186, establishes, that, as the insurance of goods at one rate or value, does not preclude the right to insure them subsequently at a higher valuation, the exclusive operation of the first policy will be limited by its terms, and will leave the excess open for the action of the second.

The question arose in *Pleasants v. The Maryland Ins. Co.*, 8 Cranch, 55, under somewhat peculiar circumstances, which merit an attentive examination. The suit was brought on a policy, by which the goods insured were valued at their invoice price in roubles, each rouble being estimated at forty-six cents; and the defence was, that the plaintiff had received \$369,000 on eight prior policies, which considerably exceeded the interest at risk, if the rouble were rated at its real value. This state of facts was said to show that the whole property was covered by the prior policies, and that nothing was left for the operation of that on which the suit was founded, and that it would be unjust to permit a recovery, which would place those who paid at the highest valuation, at a disadvantage in enforcing their rights under the abandonment which

had been made by the insured, as compared with those who had insured at a lower rate of value. But the court were clearly against the defendants on the first point, and held, that the second was an inconvenience which grew out of their own contract and which consequently should not be allowed to prejudice the plaintiff. "There is," said Johnson, J., in delivering the opinion of the court, "one difficulty, of which the court are fully aware, which is, that the interest assigned in the abandonment, if estimated in roubles, will be inversely as the rule at which the rouble is estimated, so that he who pays most, would acquire least. But in this case the objection does not arise, as the plaintiff, by a compromise with the underwriters on some of the other policies, had reserved a sufficient interest in the subject of abandonment to meet the just claims of these underwriters. And in no case would this consideration create a difficulty, as between the parties to a policy. Among the underwriters in the distribution of the proceeds of the thing abandoned, alone, would it be necessary to determine on the correct rule to be applied in such a case."

It follows, from what has been said, that when part of the goods covered by an open insurance, are insured by a second valued policy, which contains the usual clause with reference to prior insurances, the only deduction to be made from the valuation, will be what remains due on the first insurance, after satisfying the loss incurred on so much of the property at risk as is not covered by the second insurance. The loss was adjusted in the principal case on this basis, and the same rule was applied not long afterwards under similar circumstances, in *Minturn v. The Columbian Ins. Co.*, 10 Johnson, 75.

In *The American Ins. Co., v. Griswold*, 14 Wend. 399, the court held that the American clause operates to exclude contribution, even when there is sufficient aliment for all the policies at the time of the subscription. If goods worth \$20,000, covered by two different policies of \$10,000 each, sustained an injury of 50 per cent., the whole amount of the loss would fall on the company which first insured, without any right to contribution from the others. A different view was taken in *Whiting v. The Independent M. Ins. Co.*, 15 Maryland, 297, under which the clause in question only applies to so much of the value covered by the second policy as is also covered by the first. If the goods were insured for half their value in one office, and subsequently insured for the remaining half in another, both companies must contribute equally to the loss. It was said to follow, that payment of the whole loss by the company which first insured, would not preclude a subsequent recovery against the second. The case fell within the well settled principle that the payment of a debt by a stranger, under the mistaken supposition that it is his, does not satisfy the debt (ante, 280). *Merryman v. The State*, 5 Harris & Johnson, 423.



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